No. 83-5424

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

GLEN BURTON AKE,

Petitioner,

-against-

THE STATE OF OKLAHOMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS

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September 13, 1983

For the reasons stated, the Petitioner requests that this Motion be granted.

Respectfully submitted,

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I

QUESTIONS PRESENTED

1. Where an indigent defendant's sanity at the time of the offense is seriously in issue, can a State constitutionally refuse to provide any opportunity whatsoever for him to obtain expert psychiatric examination necessary to prepare and establish his insanity defense and to present evidence in mitigation of punishment and in rebuttal of the alleged aggravating offense of predicted future violence proven by the state through psychiatric testimony?

2. Can a State constitutionally force a criminal defendant to be heavily sedated with Thorazine while attending the criminal proceedings against him in the absence of any evidence that petitioner would fail to conduct himself properly in court?

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Petitioner, Glen B. Ake, prays that a writ of certiorari issue to review the decision of the Court of Criminal Appeals of Oklahoma on April 12, 1983, affirming his conviction of capital murder and sentence of death.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Oklahoma is reported at 663 P.2d 1 (Okl. Cr. App. 1983) and is set out at pp. A.1-12 of the Appendix.

JURISDICTION

The judgment of the Court of Criminal Appeals of Oklahoma was entered on April 12, 1983, and rehearing was denied on June 15, 1983 (A-18). An order extending until September 13, 1983 petitioner's time to file this petition for Writ of Certiorari was entered on August 12, 1983 by The Honorable Byron White, Associate Justice of the Supreme Court of the United States (A-19). No date for petitioner's execution has yet been set. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3)(19).

IN THIS CASE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the sixth amendment to the Constitution which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence;

the eighth amendment to the Constitution which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the fourteenth amendment to the Constitution which provides in relevant part:

> [N]or shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the following Oklahoma statutes, O.S. 21 § 701.7, O.S. 21 § 701.9, O.S. 21 § 701.10, O.S. 21 § 701.11, O.S. 21 § 701.12, O.S. 21 § 701.13, O.S. 22 (1971) § 1171, 22 O.S. § 1175.2, which are set out at pages A.13 - 17 of the Appendix.

STATEMENT OF THE CASE

Course of Proceedings.

Petitioner and another person were charged with two counts of murder in the first degree and two counts of shooting with intent to kill resulting from events that transpired on October 15, 1979. On June 26, 1980, petitioner was convicted by a jury of two counts of capital murder and two counts of shooting with intent to kill. On July 25, 1980, petitioner's motion for a new trial was denied and he was sentenced to death for each of the murder charges and to five hundred year prison terms for each count of shooting with intent to kill.

On April 12, 1983, the Court of Criminal Appeals of Oklahoma affirmed the conviction and sentence. Ake v. State, 663 P.2d 1 (1983). Rehearing was denied on June 15, 1983. On August 12, 1983, Justice White extended until September 13, 1983 petitioner's time to file a petition for certiorari.

FACTS RELEVANT TO THE QUESTIONS PRESENTED

(1) The Challenge by petitioner, an indigent, to Oklahoma's refusal either to appoint a psychiatrist or provide funds for him to obtain a private psychiatrist to evaluate his mental state at the time of the offense and his forcible sedation with Thorazine by the State during trial.

On October 15, 1979, following two days of heavy drinking and drug use, petitioner, accompanied by another man, forcibly entered the home of the Reverend Richard Douglass in Canadian County, Oklahoma. The Reverend, his wife and their two teenage children, Richard and Leslie, were at home. After burglarizing the house, petitioner bound, gagged and shot the members of the Douglass family. The Reverend and Mrs. Douglass died as a result. Petitioner was apprehended in Colorado in November 1979 and extradited to Oklahoma to face criminal charges.

Three months later, in February 1980 at petitioner's arraignment in Oklahoma, the presiding judge sua sponte ordered a psychiatric evaluation of petitioner's mental state and competency to stand trial. Petitioner was sent for approximately two months of observation to a state mental institution, Eastern State Hospital, in Vinita, Oklahoma. Pursuant to Oklahoma statute, the staff of the mental health facility examined petitioner's mental state only with respect to his then present sanity and competence to stand trial. 22 O.S. (1971) § 1171 (A. 16-17).

Petitioner Found Insane at Competency Hearing.

The Court held a special hearing on April 10, 1980 to determine petitioner's competency to stand trial. At the

competency hearing, two psychiatrists testified to petitioner's lack of sanity. Dr. William Allan, a court appointed psychiatrist, had examined petitioner and had spoken with another psychiatrist, Dr. R.D. Garcia, the forensic psychiatrist at the Eastern State Hospital where petitioner had been committed for observation at the direction of the court. Dr. Allan gave the following testimony regarding petitioner:

> "he is a psychotic . . . his psychiatric diagnosis was that of paranoid schizophrenia -- chronic, with exacerbation, that is with current upset, and that in addition to the psychiatric diagnosis, that he is dangerous."

[Transcript April 10, 1980 (A.22)] Dr. Allan's recommendation was that:

> "[B]ecause of the severity of his mental illness and because of the intensities of his rage, his poor control, his delusions, he requires a maximum security facility within -- I believe -- the State Psychiatric Hospital system."

Dr. Allan, when questioned about whether petitioner could then, six months following the offense, tell right from wrong responded that petitioner could not:

> Q. Do you have an opinion as to whether Mr. Ake at this time understands the significance or the difference between right and wrong?
> A. At this time?
> Q. At this time?
> A. I have to give a qualified opinion because - uh - all of his statements are couched in terms of his religious beliefs which are delusional and his concept of right and wrong does not accept the Court's authority of government.
> Q. I see.
> A. So, he just doesn't accept what the rest of us live by . . . .
> Q. [D]o I interpret your answer to say that in terms of society's judgment as between right and wrong, whatever things he may have are not on that level but are somewhat different?
> A. Yes. His world would be a different dimension. He does not, as I understand it, accept the ordinary rules of right and wrong.

[Hearing transcript 4/10/80 (A.23)].

Dr. Jack Enos, a medical doctor with 29 years experience, testified that he had not examined petitioner long enough to form an opinion as to whether petitioner was

then capable of distinguishing right from wrong (id.), but he did give his opinion that petitioner was mentally ill, dangerous and should be treated within the confines of a maximum security hospital (id. 24). At the April 10, 1980 competency hearing, neither psychiatrist was asked his opinion as to whether petitioner could tell right from wrong at the time of the offense.

After hearing the psychiatric testimony, the Court found petitioner to be mentally ill and in need of care and treatment and accordingly ordered petitioner recommitted to the state mental hospital. 22 O.S. §§ 1171, 1175.2 (A.16 - 17). Pursuant to Oklahoma statute, the criminal proceedings against petitioner were temporarily suspended. Id.

Petitioner Subsequently Adjudicated Competent To Stand Trial.

After seven weeks at the Eastern State Hospital in Vinita, Oklahoma, the facility's forensic psychiatrist, Dr. R.D. Garcia, wrote a letter, dated May 22, 1980, to the court expressing his opinion that petitioner was competent to stand trial (A.20). Dr. Garcia recommended that Mr. Ake be maintained on 200 milligram doses of the sedative Thorazine, to be administered three times daily (id.). Without any further inquiry, on May 27, 1980 the Court reinstated the criminal charges against petitioner.

The Oklahoma court appointed counsel to represent petitioner because of his indigency. At a pretrial conference held on June 13, 1980, petitioner's counsel informed the Court that petitioner would plead not guilty by reason of insanity. Counsel also informed the Court that he needed the assistance of a psychiatrist to examine petitioner with respect to his mental condition at the time of the offense in order to prepare an adequate insanity defense [June 13 Transcript (A. 26-30)]. During petitioner's four-month stay at the Oklahoma state mental health facility, no such

examination had been performed. Counsel asked that, in view of petitioner's indigency, the Court either appoint a psychiatrist to examine petitioner or provide petitioner with the funds necessary to hire a private psychiatrist to do so. [Transcript of hearing dated June 13, 1980 (A.27-31)]. Petitioner's counsel argued that the psychiatric testimony at the competency hearing raised a substantial question of petitioner's sanity at the time of the offense and that "Glen Ake, indigent [with] court-appointed counsel, still under the Constitution is entitled to monies for a psychiatrist as if he were another Cullin Davis who had the money to pay for it." [Id. (A.26)] Petitioner's counsel made it clear that

> "[T]he man does not have any money . . . he was appointed legal counsel. Thus, in order to properly give him the defense necessary, then when the court-appointed legal counsel, the thing that stems from that would be a meagre amount of funds to prepare for the case . . . ."

Id. at 21, 24 (A.28).

The trial court denied petitioner's request, refusing to appoint a psychiatrist or to provide funds for petitioner to hire one. The Court justified its action by noting that provision of a psychiatric expert was not "specifically authorized by statute" and that the practice in Oklahoma, as determined in Stidham v. State, 507 P.2d 1312 (Okl. Ct. App. 1973) and Tims v. State, 525 P.2d 1227, was to deny indigent defendants that right. Id. (A.31). Recognizing the relevancy and materiality of the requested psychiatric examination to petitioner's insanity defense, the Court ruled that petitioner's counsel could "have the defendant available, if you are able to arrange [the psychiatric examination] in some other manner." (Id.)

Petitioner Was Able To Introduce No Psychiatric Testimony In Support Of His Insanity Defense At Trial.

In one day, June 24, 1980, the evidence of both the prosecution and the defense was presented to the jury. No psychiatric evidence relating to petitioner's mental state at the time of the offense was introduced because Oklahoma refused to provide petitioner with any opportunity to have such a psychiatric evaluation performed, despite his indigency. Petitioner thus received no psychiatric examination as to his sanity at the time of the offense and no psychiatric assistance in preparing and establishing his insanity defense.

At trial, the defense called the three psychiatrists the state had relied on to establish petitioner's incompetency and subsequent competency to stand trial in the Spring of 1980. In his trial testimony, Dr. Enos diagnosed petitioner as "paranoid schizophrenic and mentally ill" (id. at 575 (A.40)). Dr. Enos also testified that he had learned from petitioner's mother that petitioner had a history of mental problems [(id. at 579 (A.44))]. Dr. Garcia also testified at trial that petitioner was mentally ill [(id. at 592 (A. 47))]. None of these psychiatrists was able to give an opinion about petitioner's sanity at the time of the offense because they had not examined him for that purpose.

Nevertheless, the prosecution repeatedly emphasized to the jury that the psychiatrists had no opinion of petitioner's sanity at the time of the offense, fueling the unwarranted inference that petitioner's insanity defense was without merit. The prosecution pressed each psychiatrist on whether he had performed or seen the results of examinations diagnosing petitioner's mental state in October 1979 -- the very examinations petitioner had requested and Oklahoma had denied. [Transcript of trial, June 24, 1980, at pp. 564, 566, 584, 597, 602 (A.34, 36, 45, 49, 51).]

Petitioner Was Forcibly Sedated Throughout His Trial.

Pursuant to instructions of a psychiatrist, Dr. R. D. Garcia, employed by the Oklahoma state mental health facility at Vinita where petitioner had been committed for four months, petitioner was forcibly sedated with 600 milligrams of Thorazine per day throughout his trial. "Thorazine is a major tranquilizer used in people who are psychotic, as opposed to neurotic." [Trial testimony of Dr. Enos, transcript of June 24, 1980, p. 574 (A.39).]

Petitioner did not testify at trial. Indeed, he "remained mute throughout the trial . . . refused to converse with his attorneys and stared straight ahead during both stages of the proceedings." Ake v. State, 663 P.2d 1 (Ok. Cr. App. 1983). Petitioner's counsel objected to the heavy sedation with Thorazine during the trial because it rendered petitioner "zombie"-like, prejudicing him before the jury and rendering him incapable of reacting to the testimony of witnesses against him and unable to assist his attorneys [e.g., Transcript of Trial, pp. 659-670 (A.52-63)].

At the conclusion of the criminal responsibility phase of the trial, the jury returned a verdict of guilty as to the two counts of first degree murder and two counts of shooting with intent to kill.

At The Sentencing Stage Of Petitioner's Trial, He Was Denied The Assistance Of An Expert Witness But Oklahoma Relied On Expert Psychiatric Testimony To Prove An Aggravating Circumstance Necessary To Support Imposition Of The Death Sentence.

The State of Oklahoma relied on the testimony of psychiatrists, especially that of Dr. Garcia, to establish an aggravating circumstance, i.e., that petitioner would predictably commit future acts of violence. [E.g., id. at 601, 714, 716 (A.50, 64, 65).] Petitioner had no expert psychiatric witness to rebut the State's psychiatric testimony. Moreover, petitioner's counsel was deprived of the expert psychiatric assistance necessary to prepare and

establish mitigating evidence, such as petitioner's mental state at the time of the offense or the psychological effects of the child abuse petitioner suffered at the hands of his father.

The jury found three aggravating circumstances,* including petitioner's supposed likelihood of future dangerousness, and no mitigating circumstances. The jury sentenced petitioner to death.

The trial court sentenced defendant on July 25, 1980 to death for each of the murder counts and to a term of five hundred years in prison for each of the two counts of shooting with intent to kill.

Petitioner's Appeal Of The Denial Of A Psychiatrist And Forcible Sedation During Trial.

The Oklahoma Court of Criminal Appeals affirmed the judgment and sentence. Ake v. State, 663 P.2d 1 (Okl. Cr. App. 1983). On appeal, petitioner contended that "he, as an indigent defendant, should have been provided the services of a court-appointed psychiatrist and a court-appointed investigator as incident to his constitutional rights of effective assistance of counsel and availability of compulsory process for obtaining witnesses." Id. at 6. The Oklahoma Court of Criminal Appeals disagreed:

> "The unique nature of capital crimes notwithstanding, the State does not have the responsibility of providing such services to indigents charged with capital crimes."

Id.** The Court noted the obvious fact that petitioner had

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* The aggravating circumstances found were that the crime was committed to avoid arrest; the petitioner was likely to commit future acts of violence; the murders were especially cruel, heinous and atrocious.

** After addressing the merits of petitioner's appellate claim, the court indicated that "[t]he argument was not preserved in the motion for new trial. It was thereby waived." However, in capital cases, by Oklahoma statute, O.S. 21 § 701.13 (A.15), the "Oklahoma Court of Criminal Appeals shall consider the punishment as

(Footnote Continued)

"failed to establish any doubt of his sanity at the time the crime was committed", but ignored the fact that petitioner attempted to do so -- but was prevented by the policies of the Oklahoma court.

The Oklahoma Court of Criminal Appeals emphasized, as the prosecution had at petitioner's trial, the inability of any of the psychiatrists who testified to give "an opinion of the state of appellant's mental condition prior to the time they observed him." Yet this failure of evidence resulted solely from petitioner's indigency: Oklahoma refused to appoint a psychiatrist to evaluate petitioner's mental condition at the time of the offense and he lacked the funds to retain one.

Petitioner also contended on appeal that the Thorazine rendered him unable to understand the proceedings against him and to assist counsel with his defense. He also complained that his drugged and drowsy demeanor resulting from sedation with Thorazine prejudiced him in the eyes of the jury. The Court of Criminal Appeals held that the Thorazine did not impinge on petitioner's rights, relying on Dr. Garcia's May 22, 1980 letter which stated that under the influence of Thorazine petitioner was competent to stand trial. Id. at 6. With respect to petitioner's "abnormal" behavior -- "remaining mute throughout trial, refusing to converse with his attorneys, staring straight ahead during both stages of the proceedings" -- the Court of Appeals refused to concede any possibility that the Thorazine was responsible. Instead, the Court merely hypothesized that perhaps:

> [T]he defense of insanity interposed by defendant fostered such behavior on his

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(Footnote Continued)

well as any errors enumerated by way of appeal." (emphasis added). The Court of Criminal Appeals addressed the merits of petitioner's claim on appeal because it was required, under Oklahoma law, to do so in a capital case despite an otherwise cognizable procedural waiver.

part . . . . Notwithstanding the appellant's 'abnormal' behavior at trial, the jury determined that he was sane.

Id. at n.4. There is at least enough doubt as to the cause of petitioner's "abnormal" and zombie-like trial demeanor to raise a reasonable doubt as to his ability to act differently under the influence of Thorazine. There is no basis in the record, however, to conclude that petitioner's zombie-like state was not induced by Thorazine but was instead "feigned" in order to advance his defense of insanity.

REASONS FOR GRANTING THE WRIT

I. THE CONSTITUTION MANDATES THAT OKLAHOMA PROVIDE PETITIONER, AN INDIGENT CRIMINAL DEFENDANT, WITH THE OPPORTUNITY TO ESTABLISH BY EXPERT PSYCHIATRIC EVIDENCE HIS INSANITY DEFENSE.

Where an indigent criminal defendant's mental state at the time of the offense is substantially in dispute, a state has the constitutional obligation to provide expert psychiatric assistance in the preparation and establishment of his insanity defense.*

A. A Criminal Accused's Right To Expert Psychiatric Assistance In Appropriate Cases Is Founded In The Constitution.

This Court has long recognized that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Griffin v. Illinois, 351 U.S. 12, 19 (1956) (plurality opinion, Black,

* This Court has previously granted certiorari on this question. Bush v. Texas, 372 U.S. 586 (1963). The Court did not address the question, however, because subsequent developments made it unnecessary with respect to that petitioner. The case was vacated and remanded for a new trial in which psychiatric evidence would be considered. Id. at 589-90. This Court again expressed concern about this question at the oral argument of the case decided last term, Barefoot v. Estelle, ___ U.S. ___, 51 U.S.L.W. 5189 (1983).

J.). This precept is most compelling when indigency alone would prevent an accused from introducing evidence to negate criminal responsibility.

> [It] is a matter of common knowledge, that upon the trial of certain issues, such as insanity or forgery, experts are often necessary both for prosecution and for defense. . . . [A] defendant may be at an unfair advantage if he is unable because of poverty to parry by his own witnesses the thrusts of those against him.

Reilly v. Barry, 250 N.Y. 456, 461, 166 N.E. 165, 167 (1929) (Cardozo, C.J.).

The constitutional right of a criminal accused to expert psychiatric assistance in establishing the insanity defense has been consistently safeguarded by the federal courts. State convictions obtained in derogation of this right must be reversed. Alvord v. Wainright, 564 F. Supp. 459, 484 (M.D. Fla. 1983) ("[U]nder appropriate circumstances, a defendant must be provided a psychiatric examination when such is necessary to a reasonable investigation of the insanity defense."); Blake v. Zant, 513 F. Supp. 772, 787 (S.D. Ga. 1981) ("[I]n a capital case, a defendant whose sanity at the time of the crime is fairly in question, has at a minimum a constitutional right to at least one psychiatric examination at state expense."); Bush v. McCollum, 231 F. Supp. 560 (N.D. Tex. 1964), aff'd, 344 F.2d 672 (5th Cir. 1965).

Various constitutional guarantees are implicated when a criminal accused is denied psychiatric assistance.

> In order for [defendant] in the instant case to have the effective aid of counsel, it was necessary for his counsel to have the assistance of a qualified psychiatrist; a trial, without expert evidence as to sanity, which found him sane and resulted in a life sentence is so lacking in fairness as to be a denial of liberty without due process of law, contrary to the Fourteenth Amendment.

Id. at 565.

In addition to equal protection, due process, and effective assistance of counsel concerns, equally important Sixth Amendment rights to compulsory process for obtaining witness and confrontation of adverse witnesses require that indigent criminal defendants be provided with expert psychiatric assistance where appropriate. Note, The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings, 55 Cornell L. Rev. 632, 641-43 (1970); accord Smith v. Enimoto, 615 F.2d 1251 (9th Cir. 1980), cert denied sub nom., Smith v. Director, 449 U.S. 866 (1980) (indigent's constitutional right to investigative services funded by the state); Williams v. Martin, 618 F.2d 1021 (4th Cir. 1980) (reversing murder conviction where state denied indigent assistance of forensic pathologist).

Congress, too, has recognized the need for the government to provide indigents with expert assistance and has responded by enacting 18 U.S.C. § 3006A(e) (Supp. III 1979). That "Act was designed to implement the Sixth Amendment guarantee of effective assistance of counsel." 110 Cong. Rec. 445, 18521 (1964); 109 Cong. Rec. 14224 (1963) (recognizing the need for expert psychiatric assistance). Similarly, at least forty states currently provide indigents with varying degrees of expert assistance at state expense.*

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* Fifteen state statutes specifically mention expert assistance, although three states -- California, Illinois, and Pennsylvania -- limit express application of expert assistance to capital cases. Ariz. Rev. Stat. Ann. § 13-4013(B) (1978); Cal. Penal Code § 987.9 (Deering 1980); Ill. Ann. Stat. ch. 38, § 113-3(d) (Smith-Hurd 1980); Iowa Code Ann. § 813.2(1979); Kan. Stat. Ann. § 22-4508 (1974); Minn. Stat. Ann. § 611.21 (West 1979); Mo. Rev. Stat. § 600.150 (1978); Nev. Rev. Stat. § 7.135 (Supp. 1980); N.H. Rev. Stat. Ann. § 604-A:6 (1974); N.Y. County Law § 722-c (McKinney 1979); N.C. Gen Stat. § 7A-454 (1969); Or. Rev. Stat. § 135.055(4) (1979); Pa. Stat. Ann. tit. 19, § 1501 (Purdon 1980); Tex. Stat. Ann. art. 26.05 § 1 (Vernon 1979); W. Va. Code § 51-11-8 (1980).

(Footnote Continued)

Provision of expert psychiatric assistance to indigents has been endorsed by the American Bar Association and commentators. ABA Standards Relating to the Administration of Criminal Justice § 1.5 (Draft 1968); Brennan, W. Law and Psychiatry Must Join in Defending Mentally Ill Criminals, 49 A.B.A. J. 239, 241-42 (1963); A. Goldstein and E. Fine, "The Indigent Accused, the Psychiatrist, and the Insanity Defense," 110 U. Pa. L. Rev. 1061, 1080 (1962); Note, Refusal to Provide Expert Witness for Indigent Defendant Denies Equal Protection, 59 Wash. U.L.Q. 317 (1981); Note, Right to Aid in Addition to Counsel for Indigent Criminal Defendants, 47 Minn. L. Rev. 1054, 1060 (1963).

Oklahoma's uniform refusal to assist indigents, as a policy matter irrespective of the facts of individual cases, is out of step with the prevailing norms of criminal process. Perhaps as many as nine other states also refuse to assist indigents. (See note pp. 13-14).

Courts have "long recognized a particularly critical interrelation between expert psychiatric assistance and minimally effective assistance of counsel." United

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(Footnote Continued)

The remaining state statutes deal generally with reimbursing private court appointed counsel for expenses necessarily incurred in the representation of an indigent criminal defendant. California and Illiois, in addition to the explicit statutes cited above, also have general reimbursement statutes. Ala. Code §§ 12-19-252, 15-12-21(b) (1977); Alaska Stat. § 18.85.100 (Supp. 1980); Ark. Stat. Ann. § 43-2419 (1977); Cal. Penal Code § 987.2 (Deering 1980); Colo. Rev. Stat. §§ 18-1-403, 21-1-105 (1978); Del. Code Ann. tit. 29, § 4605 (1979); Fla. Stat. Ann. § 925.035(1) (West 1973); Ga. Code Ann. § 27-3204 (1978); Ill. Ann. Stat. ch. 34, § 5609 (Smith-Hurd 1980); Ky. Rev. Stat. Ann. §§ 31.110(1)(b), 070(3) (Baldwin 1975); La. Rev. Stat. Ann. § 15:571.11-(A) (West 1980); Md. Ann. Code art. 27A § 6(d) (1976); Miss. Code Ann. § 99-15-17 (1979); Mont. Rev. Codes Ann. § 46-8-2-1 (1979); Neb. Rev. Stat. § 29-1804.12 (1979); N.M. Stat Ann. §§ 31-16-3(A), -8 (1978); N.D. Cent. Code § 29-07-01.1 (1974); Ohio Rev. Code Ann. § 2941.51 (Page 1980); S.C. Code § 17-3-80 (1979); S.D. Comp. Laws Ann. § 23A-40-8 (1979); Tenn. Code Ann. § 40-2023 (1975); Utah Code Ann. §§ 77-64-1(3), -7 (1978); Vt. Stat. Ann. tit. 13, §§ 5205, 5231(2) (1974); Va. Code § 19.2-163 (1980); Wash. Rev. Code Ann. § 36.26.090 (1980); Wyo. Stat. §§ 7-1-110(a)(ii), -115(b) (1977).

States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974) (reversing conviction where indigent defendant was not provided with a psychiatrist's assistance in preparing and proving his defense). Where the development of expert evidence by a psychiatrist respecting a defendant's sanity has been hampered because of indigency, courts in federal cases have not hesitated to vacate the conviction and remand for a new trial with evidence received as to a psychiatric examination and an opinion of the accused's mental condition at the time of the offense. E.g., id., supra; United States v. Fessel, 531 F.2d 1275 (5th Cir. 1976); United States v. Taylor, 437 F.2d 371 (4th Cir. 1971); Owsley v. Peyton, 368 F.2d 1002 (4th Cir. 1966).

> [W]hen an insanity defense is appropriate, the indigent defendant is entitled to psychiatric assistance necessary to both the preparation and presentation of an adequate defense.

United States v. Lincoln, 542 F.2d 746, 750 (8th Cir. 1976), cert. denied, 429 U.S. 1006 (1977).

B. There Was A Breakdown In The Adversary Process In This Case Because Petitioner Was Foreclosed By His Indigency From Obtaining Expert Psychiatric Assistance In Preparing And Proving His Insanity Defense.

"One of the assumptions of the adversary system is that defendant's attorney will have at his disposal the essential means and elements to conduct an effective defense." Report of the Attorney General's Comm'n on Poverty and the Administration of Federal Criminal Justice 45-46 (1963) (hereinafter "Attorney General Report"). Accordingly, "[I]t follows that in so far as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversarial system." Id. at 11. See also, 1964 U.S. Code Cong. & Ad. News 2996 (setting forth rationale for the Federal Criminal Justice Act).

Petitioner's conviction is tainted because it was not the result of a vigorous adversarial contest.

Petitioner had no opportunity to establish his insanity defense through expert psychiatric testimony and indeed he had no psychiatric examination relevant to his mental state at the time of the offense.

The Oklahoma trial court was indifferent to petitioner's inability to establish his insanity defense, stating it had no statutory authority to appoint a psychiatrist and that Oklahoma's avowed policy was to deny indigent criminal defendants that right. Stidham v. State, 507 P.2d 1312 (Okl. Cr. App. 1973); Tims v. State, 525 P.2d 1227 (Okl. Cr. App. 1974). Here, the prejudice to petitioner was compounded by the prosecution's repeated questioning designed to establish that the psychiatrists had no opinion as to petitioner's sanity at the time of the offense (see p. 7 supra). Yet, Oklahoma's policy precluded that very proof.

Denied state-funded assistance, petitioner, although on trial for his life, still could not surmount the obstacle of his indigency and offer evidence in support of his substantial insanity defense. Petitioner's case clearly illustrates that "a situation in which persons are required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and equity." Attorney General Report at 11.

Oklahoma contends that it has no constitutional duty to provide this indigent petitioner the opportunity for psychiatric evaluation of his mental condition, relying on this Court's decision in Smith v. Baldi, 344 U.S. 561 (1953). In Baldi, this Court held that where the Pennsylvania court had already appointed one psychiatrist to examine the accused as to his sanity at the time of the offense and where that psychiatrist gave testimony, there was no constitutional mandate for Pennsylvania to appoint a second psychiatrist after petitioner pleaded guilty, to provide information as to the appropriate sentence. Id. at

568. Those facts clearly distinguish Baldi from this case in which Oklahoma gave petitioner no opportunity whatsoever for psychiatric examination regarding his mental state at the time of the offense.

II. Denial of Petitioner's Request for Expert Psychiatric Assistance Violated his Right to Individualized Sentencing.

There is no need to elaborate on this Court's insistence that there be individualized sentencing by the jury in capital cases during the second stage of the bifurcated trial, the sentencing stage. E.g., Gregg v. Georgia, 428 U.S. 153, 206 (1976); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Zant v. Stephens, ___ U.S. ___, 51 U.S.L.W. 4891 (1983); Proffitt v. Florida, 428 U.S. 242, 251-52 (1976); Woodson v. North Carolina, 428 U.S. 280, 304-06 (1976); Roberts v. Louisiana, 431 U.S. 633 (1977).

"Permitting an indigent capital defendant to introduce mitigating evidence has little meaning if the funds necessary for compiling the evidence are unavailable." Westbrook v. Zant, 704 F.2d 1487, 1496 (11th Cir. 1983). Where a defendant raises an insanity defense but is found guilty, a jury, at the penalty stage, may consider the psychiatric evidence presented in the first state of the trial as a mitigating factor. Smith v. Estelle, 445 F. Supp. 647 (N.D. Tex. 1977), aff'd, 602 F.2d 694 (5th Cir. 1979), aff'd, 451 U.S. 454 (1981). Here, when petitioner was precluded from developing evidence in support of his defense of insanity, he was also precluded from developing such evidence for use in mitigation of punishment at the sentencing stage. Furthermore, petitioner was denied his right to individualized sentencing and to effective assistance of counsel at that stage when he was refused an expert's assistance in developing mitigating evidence independent of his insanity defense.

Wholly apart from those grounds, petitioner was entitled to expert psychiatric assistance to rebut the aggravating offense of his predicted future violence which the prosecution established by the use of psychiatric testimony. See Barefoot v. Estelle, 51 U.S.L.W. 5189 (U.S. 1983) ("jurors should not be barred from hearing the views of state psychiatrists along with the opposing views of defendant's doctors").

Justice Frankfurter thirty years ago stressed the value of psychiatric evidence in the sentencing phase of capital cases. Smith v. Baldi, 344 U.S. 561, 573 (Frankfurter, J., dissenting) (imposition of death sentence without hearing on sanity constitutes gross denial of due process).

III. The Prejudice to Petitioner Resulting from his Appearance Throughout his Trial While forcibly drugged with the sedative Thorazine is Constitutionally Offensive.

Petitioner's counsel protested that petitioner, heavily and forcibly sedated by Thorazine which was administered three times per day in doses of 200 mgms., was unfairly placed in a zombie-like trance, which demeanor prejudiced him before the jury assessing his guilt. The Thorazine rendered petitioner unable to assist his counsel. Indeed the Oklahoma Court of Criminal Appeals itself described petitioner's "abnormal" behavior during trial, but speculated that he was acting in support of his insanity defense. (See pp. 10-11, supra.)

Petitioner contends that the forcible administration of Thorazine to petitioner, which affected his mental and physical ability at the trial, for the purpose of rendering him competent to stand trial, violated his rights to effective assistance of counsel, impaired his ability and right to confront witnesses, denied him the right to

individualized sentencing, and transgressed equal protection and due process. There was no evidence in June 1980 that petitioner could not control his behavior.

Where, as here, the petitioner's mental competence is in issue, his right to offer testimony involves far more than verbalization if he takes the stand. The demeanor in court of one who has raised the issue of his sanity is itself of probative value to the fact finder. State v. Maryott, 492 P.2d 239 (Wash. App. 1971) (reversing conviction where defendant contrary to his consent was administered tranquilizers during trial where his sanity was at issue); United States v. Chandler, 72 F. Supp. 230 (D. Mass. 1947).

In State v. Murphy, 56 Wash, 2d 761, 355 P.2d 323 (1960), a defendant who was on trial for his life was granted a new trial because he had been tried in a drugged condition forcibly administered by the State. The Murphy court well recognized that the demeanor of defendant could influence the jury in assessing whether to impose the death penalty:

> the matter of life or death of the accused may well depend upon the attitude, demeanor and appearance he presents to the members of the jury. [This requires] careful judicial scrutiny of every aspect of the trial afforded to the accused to the end that a new trial be granted in the event of a showing by the accused of a reasonable possibility that his attitude, appearance and demeanor, as observed by the jury, have been substantially influenced or affected by circumstances over which he had no real control.

Id. Petitioner's appearance before the jury while drugged denied him a fair chance for the jury favorably to "assess [his] demeanor and character." Chaffin v. Stynchcombe, 412 U.S. 17, 32 (1972). In a capital case in particular, this amounts to prejudice sufficient to reverse both the conviction and punishment. See Propriety of Criminal Trial of One Under Influence of Drugs or Intoxicants at time of Trial, 83 A.L.R.2d 1067.

Accordingly, petitioner must be granted a new trial and be permitted to attend unsedated absent contemporaneous and strong evidence by the state that petitioner would be unable to conduct himself properly in the courtroom. No such demonstration was made in June 1980.

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari should be granted.

Dated: September 7, 1983

Respectfully submitted,

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INDEX TO APPENDIX

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

IN THE DISTRICT COURT IN AND FOR CANADIAN COUNTY,

STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	PMH No. 80-8
GLEN BURTON AKE, a/k/e JOHNNY VANDENOVER,	)	CRP-79-302 CRP-79-303
Defendant.	)	CRP-79-304 CRP-79-305

IN RE: THE MENTAL HEALTH OF

GLEN BURTON AKE, a/k/e JOHNNY VANDENOVER

APRIL 10, 1980

BEFORE THE HONORABLE JUDGE FLOYD MARTIN

* * * * * *

FILED
1980 JUN 23 AM 9 57
CLYDE GENE HILLER
COURT CLERK

APPEARANCES:

MICHAEL MINNIS, Attorney at Law, Suite 750 , City National Bank Tower, 204 N. Robinson Avenue, Oklahoma City, Okla. 73102, Attorney for OPUBCO;

MR. BILL JAMES, Assistant District Attorney in and for Canadian County, State of Oklahoma, Attorney for the State of Oklahoma;

MR. DICK LEWIS, MR. JIM BREWER, MR. RICHARD STRUBHAR, Attorneys for the Defendant.

REPORTED BY:

PATRICIA GENTRY, C.S.R.
Official Court Reporter
Canadian County,
State of Oklahoma

---

that this morning?

A No.

Q Doctor, based upon your total contact with Mr. Ake, based upon all of your examination of the records available to you, and based upon your discussion with Dr. Garcia, do you have an opinion as to Mr. Ake's present mental competency?

A Yes.

Q Would you please tell me what your opinion is?

A I believe that he is a psychotic -- uh -- that his psychiatric diagnosis was that of paranoid schizophrenia--chronic, with exacerbation, that is with current upset, and that in addition to the psychiatric diagnosis that he is dangerous.

Q All right, sir. Are you familiar with the provisions of the Mental Health Act of 1953 as amended, that being the law of mental health in Oklahoma?

A Yes, sir, I am.

Q Do you have an opinion as to whether or not, within the definition of that mental health law, Mr. Ake is a mentally ill person?

A Yes.

Q I'm not certain that all of us might be as familiar with medical terminology and I wanted to see whether we could translate what you had previously said...

professional address, please?

A Jack Enos, M.D., 331 Main, Yukon, Oklahoma. I've been in the family practice of medicine for twenty-nine years, the last ten years perhaps with some added interest in psychiatry.

Q Very well. Dr. Enos, I don't want to belabor this hearing longer than necessary. I have taken both of you doctors from your practice, and I appreciate your attendance here today; I really do.

A Thank you.

Q Doctor, you have been present and have heard all of the evidence by Dr. Allan, have you not?

A I have.

Q Can you tell me, please, sir, whether your impressions or diagnosis would be, in any way different, than those Dr. Allan suggested?

A I thought he stated the situation admirably and I would concur in practically all of the findings. The only question,as to whether I have an opinion on right and wrong ...

Q Yes?

A (Continuing)... I might say I do not have that firm an opinion on this short an examination.

Q All right. Is there any other area of what Dr. Allan said that you would care to elaborate on or that you would care to distinguish your opinion from his?

A I believe not. I find it an essential agreement.

Q All right. I would like to ask you specifically, rather than just adopting his view, to state your impression of what is the least restrictive appropriate treatment at this time for Mr. Ake?

A Certainly as humane as possible, and yet, to make as sure as possible that this man is not free to suddenly burst upon society or suddenly change his environment, but well within the limits of what one can do either with drugs or whatever, a psychiatric facility most appropriate to protect him.

Q All right. I am trying to listen carefully and understand what you are saying. Do I understand you are saying to me that your suggestion is that he be...

A Mm hm.

Q (Continuing)...treated as an inpatient within a hospital confine rather than on an outpatient basis?

A Absolutely.

Q That -- what is your impression about the degree of security needed at this time?

A I think it should be maximum at this time.

Q All right. Dr. Allan suggested that his diagnosis was at this time his personality traits and his mental illness, if you please, makes him dangerous to society. Do you concur with that?

IN THE DISTRICT COURT IN AND FOR CANADIAN COUNTY,
STATE OF OKLAHOMA

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THE STATE OF OKLAHOMA,

Plaintiff-in-Error,

v.

GLEN BURTON AKE, a/k/a
JOHNNY VANDENOVER, and
STEVEN KEITH HATCH, a/k/a
STEVE LISENBEE,

Defendants-in-Error.

Case Nos. CRF-79-302;
CRF-79-303;
CRF-79-304;
CRF-79-305.

PRE-TRIAL CONFERENCE

JUNE 13, 1980
BEFORE THE HONORABLE FLOYD L. MARTIN

* * * * * * * * *

APPEARANCES:

MR. EARL E. COPPEDGE, District Attorney within and for Canadian County, State of Oklahoma, and
MR. BILL JAMES, Assistant District Attorney within and for Canadian County, State of Oklahoma;

Attorneys for the Plaintiff-in-Error.

MR. RICHARD D. STRUBHAR, Attorney at Law, 403 West Vandamer Yukon, Oklahoma 73099, and
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Attorneys for the Defendant, Mr. Ake.

MR. MARK LEA "BEAU" CANTRELL, Attorney at Law, 114 South Choctaw, El Reno, Oklahoma 73069;

Attorney for the Defendant, Mr. Hatch

REPORTED BY:
Patricia Gentry, C.S.R.
Official Court Reporter

defense furnish you a copy of a private report, but I am curious about something else that you haven't mantioned. If you intand to have a psychiatrist evaluate your client and yo are court-appointed counsel...

MR. BREWER: That comes next, judge.

THE COURT: (Continued)...how--all right. How do you intend to pay for it?

MR. BREWER: That was phase two.

THE COURT: All right.

MR. BREWER: At this time, judge, in relationship to our motion, now--I'm sure the court is very well aware of the severity of the charge--the court appointed,and by statute, we are granted certain funds by law that if the court sees necessary or fit and proper, the court can award us money to prepare a proper defense. And, at this time I am going to as the court to grant us a reasonable amount of funds in which to pay the psychiatrist with, due to the fact, one, that the court has already seen fit to incarcerate, or to send him for a mental evaluation, giving right to the court that there was a problem. And, at this point, defense counsel feels that Glen Ake, indigent, and the court appointed counsel; still, under the constitution is entitled to monies for a psychiatri as if he were another Cullin Davis who had the money to pay for it. To deny...

THE COURT: Show me any statutory or case authority

that the court even has the power to pay for it, much less any right, under...

MR. BREWER: Okay, sir. Under Title -- excuse me, judge, I have got a lot of material here,

(The court complied.)

MR. JAMES: Your Honor, while everybody's kind of looking here, I'm familiar--of course I didn't know the motion was going to be here today--but I am familiar with some recent case law that says that they are not entitled to have additional doctors appointed, and, in truth, you have appointed a doctor to examine him. You appointed the doctor at Vinita to examine him. He is a professional person. He treated him as an independant source.

THE COURT: Yes. Well, Mr. Brewer argued that there was statutory provision for that, and I was not aware of it. I thought perhaps I could learn something.

MR. BREWER: Under Title 21...

THE COURT: Under 21?

MR. BREWER: (Continued)...O.S. Supplemant, 1978, 701.14...

THE COURT: 701.14.

MR. BREWER: (Continued)...which goes to the appointment of counsel and compensation; if my memory serves me right, there is a paragraph in there or words that I can be afforded an attorney's fee and a reasonable amount for expenses.

(WHEREUPON, a discussion ensued off the record.)

MR. BREWER: Judge, may I make one other statement at this point?

THE COURT: Go ahead.

MR. BREWER: It may solve a lot of problems. Mr. Strubhar and I are both in agreement that the court appointed a very qualified M.D., Dr. William L. Allen and the court--at the time when Dr. Allen was one of the doctors that declared him to be incompetant--the court could then instruct Dr. Allen to go back and review Glen Ake at this time. That would be sufficient for us.

(WHEREUPON, a discussion ensued off the record.)

THE COURT: Let me hand you the statute book that I have received from my library now and see if you can find what you had in mind.

MR. BREWER: I figured that--if the court please, I remember seeing it, judge--if the court please, I will have to, during this very short period of time--I told the court I will furnish the court with that, but it says that, if I remember correctly, the courts said where a man is declared indigent and is appointed legal counsel, at that point in time, if the court please, is prima facie--the man does not have any money because he was appointed legal counsel. Thus, in order to properly give him the defense necessary, then when the court appointed legal counsel, the thing that stems from that would be a meager amount of funds to prepare for the case, other than

just a meager attorneys' fee. The State has an unlimited budget and things of this nature.

THE COURT: Oh, my, thank you. Go ahead.

(The parties laughed.)

THE COURT: Exclamation point.

THE REPORTER: I got that.

MR. BREWER: In Florida numerous employees, plus very good friends of the Police Department and other agents that get things done that does not cost money for defendants, indigent defendants in jeopardy of losing their life, come before our judicial system. The court appoints a legal counsel and then, having declared him indigent, then the court, by their own declaring of indigency and appointing of legal counsel, has inferred meager funds for preparation because the judge couldn't possibly conceive that defense attorneys could just be appointed and coldly walk into a case and defend a Murder One without some kind of meager money or meager means and investigating monies.

To deny to this client the indigent, individual, funds for the preparations would be a miscarriage of justice, to even appoint even an attorney, if the court please, because an attorney has got to have, as the court knows, funds to properly defend his client. And, in a Murder One case, I hear the word "expense", and I cannot possibly believe that in anybody's heart a few meager dollars is going to stand between

a man charged with Murder in the First Degree, of insuring him of a constitutional, fair and impartial trial, and being prepared because of a few dollars that they think might be spent of the taxpayers' money. Life, itself, is far too precious to consider any monetary value that might be expended within reason, and that is where the underlying factor of expenses come when they appoint an attorney. It is automatically assumed that you will get some money...

THE COURT: Mr. Brewer, let me interrupt your statement a moment.

MR. BREWER: (Continued)...I have no more to say, judge. I will write you a little brief or something.

THE COURT: Do we agree that the statute you cited, at least by number, does not appear to grant that authority, as I read it?

MR. BREWER: Yes, sir, I will agree with that.

THE COURT: All right.

MR. BREWER: But, I will just inform the court that it is in my mind. I read the statute and operated under it five times. There is someplace where I am entitled to expenses because I remember getting expenses in a case for...

THE COURT: All right.

MR. BREWER: (Continued)...$16.50 for xerox copies I made and Judge Homer Smith signed the order and I haven't cited it to you, but I will find that case or whatever he used

Remand for Present Competency. What did you mean, and what is your position?

MR. BREWER: If the court please, at this time, I believe that we are entitled to a jury trial to determine the present mental competency of Glen Ake due to the fact that he has been declared incompetent to stand trial. That motion is being prepared, and if the court please, I was in a position to tell the court that we are preparing some legal argument on that position but we don't have it here at this point in time to where we are entitled--but a question of a person's sanity has been raised in issue--we are entitled to a jury trial to determine his mental competency at this time.

THE COURT: Well, you used the expression,"remand." As I understand, all you are asking for is a separate jury trial...

MR. BREWER: Correct.

THE COURT: (Continued)...to determine the present sanity? Is that your position?

MR. BREWER: Yes, sir.

THE COURT: The State?

MR. JAMES: Your Honor, as we previously stated, we are just not prepared to argue at this time because we haven't seen the motion.

THE COURT: All right. If it should be determined that that is required, it could be done immediately preceding the trial. I don't see any reason that I have to rule on that

and bring it back to the court for your evaluation.

THE COURT: Let me state, before ruling upon your motion, I am not aware of any statutory authority in this case. I am aware of U.S. Supreme Court case in U.S. Ex Rel. Smith v. Baldy: 334 U.S. 561, 97 Law Ed. 569: 73 Sup. Ct. 391, in which the U.S. Supreme Court held that a State does not have a constitutional duty to provide private psychiatric examination to indigent defendants. Oklahoma has cited that U.S. Supreme Court case in two decisions, of which I am aware. In Stedham v. State at 507 P 2d. §1310, and Tims v. State at 525 P 2d. §1227, in both Stedhams and Tims, our Court of Criminal Appeals denied that right to defense counsel.

The further problem in regard to it is that the statutes and all of the rulings are, originally, very strict, and since then have become almost cripplingly restrictive, that courts may not-- repeat, "not"--spend any court funds unless specifically authorized by statute. This has been more and more strictly construed against courts, and so unless I can see some specific authority, I could not even consider it. The request for private psychiatric evaluation at the expense of the State is denied. You may have the defendant available, if you are able to arrange it, in some other manner.

Now, what is your position, Mr. Brewer, with regard to the motion not yet filed, but which you reminded the court you would like to file? I believe you called it a Motion to

IN THE DISTRICT COURT IN AND FOR CANADIAN COUNTY

STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff-in-Error, vs. GLEN BURTON AKE, a/k/a JOHNNY VANDENOVER, and STEVEN KEITH HATCH, a/k/a STEVE LISENBEE, Defendants-in-Error.	No's. CRF-79-302 CRF-79-303 CRF-79-304 CRF-79-305

* * * * * *

TRANSCRIPT OF PROCEEDINGS ON APPEAL

HAD FROM JUNE 23 THROUGH JUNE 26, 1980

BEFORE THE HONORABLE JAMES D. BEDNAR

* * * * * *

APPEARANCES:

MR. EARL GOERKE, District Attorney; and MR. BILL JAMES, Assistant District Attorney, appearing on behalf of the State of Oklahoma.

MR. J. MALONE BREWER, Attorney at Law, Suite 214, 2000 Classen Boulevard, Oklahoma City, Oklahoma 73106, appearing on behalf of the Defendant Glen Burton Ake.

MR. RICHARD D. STRUBHAR, Attorney at Law, 403 West Vandament, Yukon, Oklahoma 73099, appearing on behalf of the Defendant Glen Burton Ake.

REPORTED BY:

Mark W. Mishoe, C.S.R.
Official Court Reporter
Canadian County Courthouse
El Reno, Oklahoma 73036

FILED Oct 80

A Yeah, I spelled out, I think, very specifically. In the first time was "Did he have a mental illness?", and two, "Did he understand the charges against him?", and "Could he cooperate with counsel?" And, then on the second time, "Did he have a mental illness?", and "Was he dangerous?" And, in neither case did I specifically go into detail, try to get answers as to his ability to know right from wrong at the time of the alleged act.

Q So, that was not your concern, is that correct?

A That's right.

Q But, you did associate his condition, based upon what he appeared during those two. How long was your observation then, in April -- how long a period?

A I don't know, it was about -- I know it was in the court. You were there.

Q Yes, sir.

A I think it was about an hour. It was very difficult to interview him, particularly in that setting.

Q No psychological tests were administered, were they?

A No.

Q No physiological tests were administered, were they?

A No, I did have the benefit of Dr. Garcia's report of the psychological tests done at Eastern State. But, I think the psychologist there could speak to that more directly.

Q Is the mental illness that he has functional, or organic?

A The usual way of thinking, is that it is functional.

Q And, I assume it is one that's found in DSM, Second Addition?

A And, now third.

Q Third Addition. Is that the one you used to categorize, or use DSM-1, DSM-2, or DSM-3?

A Three. In this particular case, there is no significant difference.

Q Right, I understand. But, there is a significant difference in certain little areas, because mental illness is actually a result of the voting of the body annually, or something of that nature, isn't it -- to determine what categories and symptoms form it?

A No -- you mean, how--

Q For those in the DSM?

A One of the standard diagnoses in psychiatry. There is a standard diagnostic manual, and the first one came out in '52, and the second one somewhere in the '68--

Q '68, yes, sir.

A --and, the current one has just come out.

Q Also, classified in DSM-1, 2, and 3 would be mental illnesses, would be -- place one in a category who maybe worries about his job, or worries about his marriage, does it not?

A Absolutely.

Q The principal thing that I would like to know -- we

are talking about two different things, mental illness as opposed to the legal term of "insanity", is that correct?

A (Witness nods head affirmatively.)

Q One further question. And, do I understand from your testimony, sir -- or, let me ask you, as a result of your findings in April 1980, you are not attempting to determine whether the defendant was mentally sane -- the legal term, in October, or November of 1979, are you, sir?

A That's right.

MR. GOERKE: No further questions.

THE COURT: Mr. Brewer?

REDIRECT EXAMINATION

QUESTIONS BY MR. BREWER:

Q Doctor, with -- in light of your interviews and consultation with Mr. Ake, did you state that the possibility of this illness that he has been suffering from could possibly date back to age 7?

A Yes, sir.

Q Is that a possibility?

A That's a possibility.

Q So, if that possibility -- hypothetically, was correct, then on the days in question, this illness could also still be apparent then too, is that not correct?

A That's another possibility.

Q Now, doctor, on February the 22nd -- before I ask that

(Court is recessed.)

(Court is called to order with the Court, counsel, defendant, jury, and all parties present as heretofore.)

THE COURT: All right. Will the defense call their next witness, please?

MR. BREWER: Yes, sir, the defense will call Dr. Enos.

THE COURT: If you will approach the bench and raise your right hand, please.

(Witness is sworn.)

DR. JACK P. ENOS,

called as a witness for the defendant, having been first duly sworn, testified as follows, to-wit:

DIRECT EXAMINATION

QUESTIONS BY MR. BREWER:

Q State your name for the Court and jury, please?

A Jack P. Enos, M.D.

Q Now, doctor, what is your profession?

A General Practice of Medicine.

Q All right. Now, doctor, do you do any work in psychiatry

A Some. I have some interest in it.

Q Would you relate to us your background in medicine and psychiatry for us, please?

A I practiced in Yukon for 29 years. The last ten years I have been taking an ongoing course in psychiatry for general medicine.

Q Have you ever served on any sanity board, or anything for the county, and things of this nature?

A Yes, sir.

Q Doctor, call your attention to April 10th, 1980, did you have an opportunity to come in contact with an individual by the name of Glen Burton Ake?

A Yes, I did.

Q And, what was the relationship of that contact, please?

A The sanity commission had been impanelled, two doctors and a lawyer. I happened to be one of the two doctors.

Q Now, doctor, at that time at the sanity hearing, did you have an opportunity to view and talk with Glen Ake?

A I had an opportunity, yes.

Q And, tell us something about that conversation, and things that occurred at the sanity hearing, please, sir?

A Well, it was essentially onesided, very little input on the part of Mr. Ake. Some that he did not feel inclined, or necessary to talk to us, since he talked on a different plane than we talked on.

Q Did he mention talking to God, and things of this nature?

A Briefly, that was the only person whom he really communicated.

Q Did you have an opportunity to review any medical documents, any reports prior to this hearing?

A Yes, we had Dr. Garcia's report, and we had Dr. Allan's report from a previous examination in the jail here.

Q Now, combined with your own interview with the defendant Glen Ake, and review of these medical reports, at the sanity hearing did you come up with a medical opinion as to the competency, or the mental state of Glen Ake?

A Yes, uh-huh, we felt and so stated that he was mentally ill.

Q Mentally ill?

A Right.

Q Okay, sir. Now, have you reviewed any reports from Dr. Garcia regarding Glen Ake, and medication that -- known as Thorazine?

A I have.

Q Now, doctor, you are aware that Glen Ake is taking 200 milligrams of medication, three times a day -- Thorazine?

A That's what the report says.

Q What is Thorazine, and how -- what does it do to you?

A It is a major tranquilizer used usually in people who are psychotic, as opposed to neurotic.

Q Okay. How would a person react -- how would -- take me for example, which is a poor example, but take me with 200 milligrams of Thorazine -- if you gave it to me right now, what would occur?

MR. GOERKE: If it please the Court, I don't believe

this is really the proper form of a hypothetical question, if that's what he is attempting to ask.

MR. BREWER: I'll rearrange it.

Q (By Mr. Brewer:) Take a considered normal individual, give him 200 milligrams of Thorazine, and what are the reactions going to be?

A Most people will become extremely drowsy.

Q And, what about 200 milligrams, three times a day, what would that do to him?

A I think they become three times as drowsy.

Q Would it put them asleep, or put them to a point that they are--

A This is my opinion of the average person.

Q Do you have any medical opinion of the mental condition of Glen Ake?

A Yes, I do.

Q How would you classify Glen Ake at this time, to the best of your knowledge and medical belief?

A To the best of my knowledge and belief, I think this man is paranoid schizophrenic.

Q You consider him to be mentally ill?

A I certainly do.

MR. BREWER: No further questions.

THE COURT: Mr. Goerke, cross examination?

CROSS EXAMINATION

QUESTIONS BY MR. GOERKE:

Q Dr. Enos, that was your opinion on April 10th, 1980?

A It was.

Q And, it is your opinion today?

A Yes, sir.

Q All right, sir. If I might ask, how long did you observe him on April 10th?

A Well, I would estimate the whole hearing consumed not more than thirty minutes.

Q How many times have you consulted him prior to that, or observed him?

A Never.

Q How many times since then?

A Never.

Q You reached your opinion though -- and, what is the mental disorder, the exact mental disorder that you pinpointed that is recognized by DSM?

A The one I gave, I think would come nearest fitting the category, schizophrenia, chronic paranoid type.

Q This is the same book that says "mental illness" is worrying about your job, or worrying about your marriage?

A Right. It starts out that way.

Q What were the pivotal facts giving rise to that diagnosis on April 10th?

A Mainly the reports available to me by a trained psychiatrist, as well as--

Q Actually, you say "reports". Those were just letters, were they not? Were they Dr. Allan's--

A I wouldn't argue this, right. Written publications, written documents.

Q Right, a letter recommending that he be committed for observation, that he couldn't reach any conclusions. Wasn't that Dr. Allan's "report"?

A Probably. I wouldn't argue the point. He certainly said that he couldn't make some statements.

Q Right. Did you have the advantage of some psychological tests? Let me ask you, did you have the advantage of an MMPI?

A I did not.

Q Did you have the advantage of a House/Tree/Person test?

A No.

Q Thematic Apperception Test?

A No, sir. I am familiar with all of these, but none--

Q Porteus Maze Test?

A No.

Q Bender-Gestault Test?

A No.

Q Wechsler Adult Intelligence Test?

A No.

Q Graham-Kandall Test?

A No.

Q Shipley-Hartford Test?

MR. BREWER: We will object, Judge. He has already testified he didn't give him any tests, if the Court please.

THE COURT: Yeah, I'll -- I think -- was your testimony you gave no tests?

THE WITNESS: Correct.

Q (By Mr. Goerke:) No psychological tests?

A No, no psychological tests.

Q Did you give any -- let me ask you, was your diagnosis functional or organic?

A I really couldn't state that with a certainty.

Q Well, those are the two--

A Yeah, I really think it is organic, and I probably should elaborate.

Q All right, sir.

A That the medicine--

Q Let me ask you, did you have a benefit of any physiological tests, such as an x-ray, or electroencephalogram, pneumoencephalogram?

A No.

Q Neurological exam?

A Not unless they were included in Dr. Garcia's report. I don't remember whether a neurological may or may not have

been included.

Q But, you didn't rely on that?

A No, I wasn't expected to show anything.

Q So, you didn't have the benefit of any psychological tests, nor any physiological tests to reach your conclusion?

A I hate to say none.

Q Did you have the benefit of a clinical interview?

A We had the opportunity--

Q Did you conduct one?

A We had the opportunity.

Q Did you conduct a clinical--

A Did I ask him questions? Yes.

Q During that thirty minute observation period?

A Right.

Q Did you have any benefit of, or any awareness of any previous mental or medical history?

A Had testimony from his mother, and others.

Q But, nothing documented?

A By word of mouth.

Q Did you consult with any of these former co-workers?

A No.

Q Friends?

A No.

Q Police officers?

A I don't believe any officers testified at the time.

A He is sick.

Q Is he mentally sick?

A Yes.

MR. BREWER: No further questions.

THE COURT: Anything further, gentlemen?

RECROSS EXAMINATION

QUESTIONS BY MR. GOERKE:

Q Doctor, you haven't seen him since April 10th, have you?

A No, sir.

Q Do you really feel that you can formulate within a certain degree of medical certainty, or psychiatric certainty that opinion? Are you really qualified?

A I don't know if anybody is really qualified. I should probably, might have to say he was sick on April the 10th.

Q All right, sir. And, what we are talking about still is mental illness, would you agree?

A Right.

Q Is there any place, in any report you have ever seen, or anything you have had the benefit to review, that has said "this defendant was legally insane in October or November of 1979"?

A No, sir.

Q Do you have any opinion as to whether--

A No, sir.

THE COURT: All right. Thank you, Dr. Enos, you are excused, you are free to go.

THE WITNESS: Thank you.

THE COURT: All right. Call your next witness.

MR. BREWER: If the Court please, we will call Dr. Garcia.

THE COURT: Dr. Garcia, if you will approach the bench and raise your right hand.

(Witness is sworn.)

DR. R. D. GARCIA,

called as a witness for the Defendant, having been first duly sworn, testified as follows, to-wit:

DIRECT EXAMINATION

QUESTIONS BY MR. BREWER:

Q How are you, doctor? Would you state your name for the Court and jury, please?

A My name is R. D. Garcia, M.D.

Q Dr. Garcia, how are you employed?

A I'm employed at the Eastern State Hospital, at Vinita, Oklahoma, as a psychiatrist.

Q All right. Now, that is a State Hospital, is that not correct?

A Yes, sir.

Q All right. Now, for the ladies and gentlemen of the jury and for the record, would you please relate to us your

we sent him back to the court declaring him competent to face trial, and that took place when he left Eastern State Hospital on June 9th, of this year.

Q All right. Now, doctor, medically speaking, would you still classify Glen Ake as mentally ill?

A He still would be classified mentally ill, but in remission. In other words, in terms of the symptoms with medication as a follow-up. What I mean to say, if we tried to discontinue his current medication that he is taking now, he might become overtly ill again.

Q All right. Now, you will have to -- I'm in kind of an awkward position, you might kind of guide me a little bit. An individual who is paranoid psychotic -- okay? That is taking hallucinogenic drugs, consumming a large quantity of alcohol -- okay? Given the combination, would the reaction that you say in your evaluation of Glen Burton Ake, at that point in time, and under those conditions, would an individual be able to distinguish right from wrong?

A If that's true, I would consider him unable to do so.

Q Unable to know, or to--

A The basic difference between right or wrong -- the legal way.

Q He wouldn't know--

A But, not necessarily considering him legally insane, in a way like knowing right from wrong, because a mentally ill

individual, they still know some basic difference between right and wrong.

Q But, under that situation then, through the consumption of alcohol, hallucinogenic drugs, and paranoid schizophrenia, there is a possibility that it would render a person unable to distinguish right from wrong, am I saying that correctly?

A That's correct, sir.

Q All right, sir.

A Absolutely.

Q So, given a hypothetical situation, on a given date, at a given time, a paranoid schizophrenic drinks a lot of alcohol, and takes hallucinogenic drugs, he could then commit an act that he does not know, or is not responsible for, is that not correct, sir?

A It is a possibility.

Q All right. Now, doctor, so I can understand, the jury can understand, what tests -- I don't have a list of all those names. There is a whole bunch of tests you give people, you know, when you do them. Did you give him a bunch of tests, and things of this order?

A Quite a bit of testing with regard to his emotional condition, family life, history of mental illness, treatment in the past, tests whether he was basically just a plain antisocial, or malingering individual -- hardly not. These tests were all undertaken. In the IQ test, in the beginning he failed to score

Q Okay. Not legally insane as knowing right from wrong, but just incompetent to aid in his defense, is that correct?

A Yes, sir.

Q Was there any call at that time for a diagnosis as to October or November 1979? Were you looking into that?

A No, sir. We were unable to assess him during that -- those months.

Q You made a determination that he was mentally incompetent, or mentally ill, is that correct, in April?

A Yes, sir, in March and April.

Q And, then you received him back when, sir?

A April 10th, which was returned back for treatment.

Q And, you sent a letter saying that he was competent to stand trial on what date, sir?

A That was -- I don't have the letter here with me, but--

Q Approximately May 22nd?

A May 22nd, yeah, that's correct.

Q So, you had him back for twenty days approximately -- I don't remember the days, how many days in the month, but around twenty days in April, and then another twenty-two days. So, anywhere from forty-two to forty-three days, is that correct?

A That's correct.

Q And, you found that -- by the time of writing the letter somewhere, that he was competent to stand trial?

Q Did he possess the ability to do that even at that time?

A He did not possess much ability to do the complete testing at the time.

Q And, later tests after you stabilized him during this time period, show that he had normal mentality, is that correct?

A Yes, sir.

Q I did not understand, but you talked about -- something about, he never acted out, or would you explain what you mean?

A It is the same as malingering spell. Acting out is behavior, or emotional thinking like a person is feigning, or malingering, or faking.

Q And, you said something about -- now, truthful, all I caught was violent and dangerous. That he is potentially violent and dangerous if he comes off his medicine?

A Yes, sir, that's what we thought -- without medication he may be potentially dangerous.

Q Be likely to act out again?

A And, likely to show his mental illness again.

Q Now, doctor, we have talked about "mental illness", is really what all this conversation has been about, even with Mr. Brewer and myself, is that correct?

A Yes, sir.

Q In '72 you started testifying -- you said in criminal cases, is that correct?

A That's correct.

Q So, for the last eight years you have been the expert from Vinita Hospital, is that correct?

A Yes, sir.

Q Now, today -- you know the phrase of "legal insanity"?

A Yes, sir.

Q Have you done any testing, or evaluation of Glen Burton Ake as towards legal insanity at the time of the commission of the offense?

A No, sir, we were not able to.

Q Do you have any opinion as to Glen Burton Ake's mental insanity at the time of the offense -- October or November?

A No, I would not say. I have a personal opinion.

Q Do you have no opinion then that you can -- professional opinion? You have done no testing?

A Professionally, no, sir.

Q When you were testing -- hypothetically, if you were testing Glen Burton Ake in March, and April, and May, if he would have been able to relate the incidents that's on trial here -- and, you are aware of what the charges are, aren't you, sir?

A Yes, sir.

Q Two murder counts, we are talking about basically. Do you understand that? And, an incident where two children were shot?

then Vinita for mental observation. And, what occurs? It comes back and says he is incompetent. Not that he is insane, but he is incompetent. They didn't address the question as to what was his sanity at the time in question of the alleged incident at this point.

So, what do we know at this point? That the man is mentally sick, and he is mentally ill. Now, did that information come to you from the highpowered doctors, paid by big defense lawyers out of a big defense fund? Huh-uh. It came to you by court appointed doctors, asked by a Judge to go visit the defendant. It came to you from a man who was appointed by the Court -- Dr. Enos, to sit on a sanity board. And, then by Dr. Garcia who is employed by the State of Oklahoma, who also represents the people, and he told you about the problem.

Now, chapter six is entitled "The Zombie, a/k/a The Blue Angel." Now, that may sound strange, but I'm going to show you exactly where the situation that we are faced with. The Zombie, right there -- Glen Burton Ake. We know one thing for sure right now, ladies and gentlemen, that there is no question in your mind -- there can't be, that as we sit here right today, Glen Burton Ake is under 200 milligrams of a sedative, that the doctor said if taken by normal human beings, it would knock them flat. So, he is tranquilized. His Constitutional rights to a fair trial, and the State has got him drugged.

Now, I didn't ask for those drugs. I don't even know what

that thing was. I couldn't even pronounce the -- couldn't even pronounce what it was. But, we got into it and it is a tranquilizer, where the doctor said on me, or you, or -- I forget, something about a normal human being, that it would really knock them out -- three times a day. That's 600 milligrams, not 200. And, here we are in a jury trial, the man is under 600 milligrams of tranquilizer, in our system of justice.

One thing we know though, as I stand right here, right now -- there is not a slight question about it, that man right there -- Glen Burton Ake, is mentally ill. It came from that witness stand, three doctors -- three psychiatrists -- and, don't forget Dr. Garcia, he has a whole staff. We are not just talking about Dr. Garcia himself. We are talking about -- what did he say? There was some nurses that gave him some x-rays. They checked him physically. They looked at him mentally. Even Dr. Garcia say, "Hey, I thought this guy was playing. I gave him all of these tests. We find out he is not." But, what do we know right this minute? That all three doctors agreed on? That man right there is mentally ill. He is mentally ill. That is undisputed.

I don't know where we turn, ladies and gentlemen, in our society. I don't know much about mental illness, but I know that a man that is mentally ill is treated -- is treated, not punished. His mental illness, they say, is under control by use of this drug. Now, I don't really understand that either.

I kind of compare it to, I break my leg, you know, and it hurts and then they give me something -- some morphine. Well, it quits hurting, but I still got a broken leg. And, that's what they said about this man. As long as he got this medicine, he is going to be kind of all right. You observe him, what else can he be? The Zombie. But, we know that at the time of this crime he wasn't on this medicine, was he? Huh-uh. We know that he was a paranoid schizophrenic at that time, don't we? Yeah. I mean, if we are going to believe psychiatrists. And, I don't know about that either, but that's what they said. And, they work for the State, and they make their living at it, and they study it, and they study it, and they study it. All the articles, and all of the books, and everything -- they know all about it, and that's what they said.

Do you know, as you prepare in your defense, and everything that you have got you have to pull from the State -- pull from the State, we have to come in here and write the final chapter in the State's book -- as they talked about, their five chapters. We are required to write the fifth chapter -- or, the sixth chapter.

Ladies and gentlemen, the issue is -- and, I think you can clearly see this, as I try to put it together in my own mind, that there is no question that Reverend Douglass was shot. There is no question that Mrs. Douglass was shot and killed. There is no question those kids were shot. You know, that's not an

issue, we know that. What is really at issue, and is trying to be camouflaged, is trying to be put way back on that back burner, saying "Hey, we don't really know.", is whether or not this man right here, did in fact know what he was doing. For God sakes, we don't take people who don't know what they are doing and punish them. Or, if there is a question, we dwell on it. The Court -- the Court has set it out probably better than I could ever probably set it out, because this is the law, and this is what you are supposed to follow. Now, let me just -- I'm not going to read these things to you. Let me just tell you what I want you to look at, right here, it says right here in the last page -- you will get these things with you, and it will be on Number 12 -- it will be right down here at the very bottom, I've got some marks on mine -- it says, "It is sufficient if he only introduces sufficient evidence to raise in the minds of the jury a reasonable doubt of his sanity at the time of the act." Now, at the time of the act he wasn't caught. He wasn't looked at by doctors. So, we go back in retrospect, which I think is proper. We are talking about a very serious crime, and we have to go back and look at it in retrospect. What was the situation? We know what it is now. What was it then? You know, we go back in history all the time. We try to reconstruct things like the Roman Empire, and things. They go back in retrospect, and they are pretty accurate. You know, they do the same thing on people. And, the same thing on situations like this.

Dr. Allan said that from his discussions with Mr. Ake, that he discussed, and said that even as far back as the age of 7, he was talking and discussing problems with the Lord, and God, which gave rise to the first indication of his testimony of a paranoid schizophrenic. Now, we know that it was -- or, we have reason to believe that it started somewhere back in that neighborhood -- maybe not severe. Dr. Garcia said a paranoid schizophrenic that comes in contact with a foreign substance -- either alcohol, or drugs, or both, could reach a state, or a point that he does not know the difference between right and wrong. That's one point we have to look at -- that is in retrospect.

Now, what did the other doctor say? One, Dr. Allan said -- "does he know right from wrong?" And, he said, "yes." But, he also followed that up by saying, "He did not accept the authority that we have right now." Now, what did he mean? If you don't accept the authority, and you are mentally ill, then the authority you are operating by does not correlate to our authority. Thus, you are not saying right from wrong on our level, but on some other level. That's exactly what Dr. Allan said. He went on to say that he felt like that he was an avenging angel of God. I don't remember exactly what he said -- (demonstrating) that God was here, and he sat here, and he was the avenging angel. Ladies and gentlemen, that does not occur just over night. It doesn't happen. That's an illness that is prolonged, and grows

inside of an individual. He didn't know he was a paranoid schizophrenic. None of us know if we are paranoid schizophrenic. But, coupled with -- but coupled with alcoholic drugs, Dr. Garcia says that there is the possibility the man could not distinguish right from wrong. The Court has said, "It is sufficient if he only introduces sufficient evidence to raise in the minds of the jury--", that's to raise in your mind, is that a possibility? Could that be possible? And, from the evidence can we adjudge that this did occur? "--the minds of the jury by a reasonable doubt of his sanity at the time of the act." All right. This document right here, which again, you know, it is not ours -- this is the State's evidence. This is a statement, that he says. Look at it. There is alcohol in here, and there is drugs in here, and at the time of the crime in this statement. There was alcohol and drugs, you know. Just read it, and that's your evidence. Just because we haven't put in evidence ourselves, doesn't mean you can't count evidence for the defense. You see what I am saying? Just because they introduce it doesn't mean it belongs to them by themselves. This statement is as much ours for our defense, and for your benefit, as it is for their prosecution and their evidence, and you have to look at it.

In our society, ladies and gentlemen, we are faced with a situation -- one, are we as educated human beings, as knowledgable people, going to sit right there and disregard the testimony of

medical doctors, because the crime that was committed was heinous, it was vicious, it was horrible, it was prominent people. You know, the Reverend and Mrs. Douglass were probably the finest people that will come down the -- will come on this earth. They were good people. But, that is not the issue. That is not the issue. And, the issue is being clouded. The issue is, is this man responsible mentally? Now, we know another thing, ladies and gentlemen, that this man in his state cannot be turned loose. Can't take him and turn him back loose, you know, you say, "Well, you didn't know what you are doing, go on downstairs and wait to get something to eat." That can't happen. And, it won't happen. We have got laws for that. It says so in these instructions -- you know 12A. 12A, right here. On the other hand, goes on in here and states about -- where is 12A? Here it is. That he will be governed by procedures set forth in the Oklahoma Mental Health Law. Not that he is turned loose. Some people say, "Hell, he is going to be turned loose." Huh-uh, that's not true.

Now, another question. The doctor said that his condition while treated with this drug, brings him back to a quasi state of normality. I believe that's in essence what he said. What does that mean, ladies and gentlemen? That means that the condition that this man has is treatable. What else did he say? "Without the drug he would revert back to the state that he was." That being incompetent, and a strong inference on insanity. So,

the doctors already said, the illness that this man suffers from is treatable. But, the State doesn't have the same kind of treatment as treatment. There treatment is incarceration in the penitentiary and lock up the door. There are other types of treatment for mentally ill people, and things of this sort. And, certainly I'm not going to ask, and I'm not standing here saying that I condone what happened, and that this man should go free and walk among the streets. I'm standing here saying, the man is mentally ill and we as a modern society -- as a modern society, certainly can consider that, and can consider the testimony of the psychiatrists.

Now, let's say that we proceed on, and you say, "Well, gee, I don't know if he was suffering from this problem at that time, or not." The next question is. First you say, "Was he, or wasn't he?" "Gee, I don't know." "Is there a possibility that he could be?" Ask yourself, "Is there a possibility that that man could not distinguish the difference between right and wrong at the time this crime was committed?" You have to answer that question yes, or no. If the question comes up, "Well, yes, there is a possibility that that man was mentally ill or insane at that time from the testimony of that witness stand, from the statement, all of the evidence you heard, that possibility does exist." Then right here in this instruction it says, that you must give that benefit to the defendant. And, by giving that benefit to the defendant leaves you no alternative than to find

the defendant not guilty by reason of insanity. Let's go on, you say, "No, I think he knew what he was doing." Now, our next question is -- the man is mentally ill, we all agree to that, but yet today in El Reno, Oklahoma, Canadian County, we have got a jury in the box, we are determining the fate of another man for a crime that is violent, but yet we know as we stand right here today, right now, right this minute, that this man is mentally ill.

Now, what else do we know about this man? He is standing trial on two counts of Murder in the First Degree, and the State has got him pumped so full of tranquilizers. That he is -- he is on trial, ladies and gentlemen, for his life.

In closing, ladies and gentlemen, let me say this. You know, so much stress has been made about rights. Mr. James pointed out he was given his rights by the Sheriff. He was given his rights by this, he was given his rights by that. And, in the tone of his voice, he makes it sound like giving an accused individual his rights is something dirty. By his own actions. That there is something that is vile. But, it is awfully funny to me that we hear every day in our society, even our own law enforcement officials, they get themselves in a little trouble -- either down in the penitentiary, or someplace else, they say, "I'm not going to make a statement, because it might violate my rights." And, even they crawl behind their rights. You know, so it is a two-edged sword. Rights belong to all of us -- all of

us, not just to Glen Burton Ake, but all of us. It is not something dirty, and it is not something that is supposed to be hampering law enforcement, as the tone of voice and the number of times it is brought out he was given his rights.

Another question; if you believe that there is a possibility the man could have been mentally ill, and you heard the doctor say that he doesn't accept our authority, did then in fact when he was given his rights to talk with them, accept his rights for what they were? Or, was he on a different level, thus not understanding what his rights are, because he accepts another authority other than this authority? The mere fact that you acquiesce to something, and you tell somebody something, in order to waive something you have got to understand what you are waiving. You know, you don't just waive something.

Another question. He is mentally ill right now. Was he mentally ill when that statement was given? A very good possibility. As the doctor said, a paranoid schizophrenic -- a paranoid schizophrenic -- that's a different point. That's a decision you are going to have to make. But, let me say this, ladies and gentlemen, in your own deliberations there has got to be fear in your heart that what occurs when -- if we would find him Not Guilty by Reason of Insanity. The Court has very deliberately answered that question for you, because that has got to arrive, because it has got to be considered. That question when you deliberate has got to come up, and the Court

in it's wisdom has answered that question for you in Instruction 669
12A. "You are further instructed that if the defendant is
acquitted on the grounds that he was insane at the time of
the commission of the crimes--", and it goes on, and on, and
on, "in that event the District Attorney shall set forth,
prepare, sign and file a petition for commitment of the defendant",
and it shall be governed under the Oklahoma Mental Health Law.
So, it is not a mere hook him out the door situation. That's
not what we are asking. We are asking to judge a mentally sick
person, like you would judge a mentally sick person. The State
wants you to judge this man as a coldblooded killer. Now, you
see the distinction. The man is not, and did not at the time
this occurred, know what he was doing. Not saying what he
did was wrong, but in order to punish him under Murder in the
First Degree he has got to know -- he has got to know. And, I
think we have raised that issue sufficiently -- sufficiently
that you must consider -- I'm not as positive as Mr. James, but
I am giving you chapter six of his book. Because I had to use
his witnesses, all working for the State of Oklahoma, and the
Court.

Ladies and gentlemen, I can stand up here and talk forever,
but you in your own minds, and your own hearts know that this is
a question, this is an item that you have got to talk about.
You have got to do it. There is no way you can get around it,
if you do your job as a juror and give us the fair and impartial

trial we are entitled to. You have got to talk about it. 670

Another question. Keep in mind as we stand here right now
in this trial going on, and you are sitting there as the juror --
normal people, that you are sitting in judgment today of a mentally
ill person. That much I know we have proven. Right now, mentally
ill, medicated 200 milligrams of -- what is that? Thorazine,
Thiazine -- you know what it is. Have we reached the stage,
ladies and gentlemen, when we walk on the moon, and we travel
around the world, we fly airplanes, we drive cars, and we live
in nice homes, and we have got machines to pick wheat out of
the field, weed out the little grains and put them up in a
basket, but yet in our judicial system we can take a man that
is told by a psychiatrist that he is mentally ill, and treat
him like a normal human being when he is still at that level?
At what point in time does the barbaric instinct of the human
being in our society be replaced by the humanitarian aspects
by the sane people. Not the crazy -- by the sane people. When
do we start thinking like sane people? When do we start sitting
in judgment of sick people, and treating them as sick people,
instead of treating them as the criminal that is denoted by the
act?

We ask you, ladies and gentlemen, to consider it. Be fair
jurors, be openminded -- this is the Twentieth Century. There
is a thing in our society called mental illness. It is not
something that is swept underneath the carpet anymore. It is

of this trial, together with the cross examination of defense witnesses -- the psychiatrists, each one of whom on cross examination stated, this defendant, Glen Burton Ake, is dangerous, he is volatile.

I would real quickly point out that our first aggravating circumstance in section -- in Instruction Number 4A, the Court has deleted, and that "The defendant knowingly created a great risk of death to more than one person." Therefore, you should not, and will not, in accordance with the Instructions, consider that aggravating circumstance. Therefore, our first aggravating circumstance, "The murder was especially heinous, atrocious, or cruel." The facts relied upon the State of Oklahoma to support this aggravating circumstance, are as follows: "The deceased, Richard Bary Douglass, while lying totally defenseless and helpless on the floor with both his hands and feet bound, and after having been gagged, was shot two times in the back." That one, particularly, you should consider in view -- or, in connection with, and conjunction with Instructions Number 5 and Number 6, defining "especially" heinous, atrocious, or cruel, "a pitiless crime which is unnecessarily tortuous to the victim." "There was a design or intention to inflict a high degree of pain or in which death was inflicted with utter indifference to, or enjoyment of, the suffering of others." I think the evidence, if you recall, bears out our aggravating circumstance.

Richard Bary Douglass was tied, his hands behind his back,

Third, "The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." The facts relied upon by the State of Oklahoma to support this aggravating circumstance, are as follows: "That in addition to the killing of Richard Bary Douglass, and the other Bill of Particulars, Marilyn Sue Douglass, occurring on the 15th day of October, 1979, and that on that same date, said defendants did also shoot and kill one Marilyn Sue Douglass, and in the other case Richard Bary Douglass, at a time when the said Marilyn Sue Douglass was bound and helpless and said defendants did shoot and gravely wound, on the same date, one Leslie Douglass, a female, of the age of twelve years at the time of said shooting, while the said Leslie Douglass was bound and helpless. That on October 15, 1979, and at the time of the murder of said Richard Bary Douglass, and in the other Bill of Particulars, Marilyn Sue Douglass, said defendants did shoot and gravely wound one Richard Brooks Douglass, age sixteen at the time of said shooting, and at a time when the said Richard Brooks Douglass was bound and helpless. That said defendants were total strangers and unknown to Richard Bary Douglass, Marilyn Sue Douglass, Leslie Douglass, and Richard Brooks Douglass at the time of the said shootings." In addition to those facts, we have added the testimony of the three psychiatrists who have evaluated Glen Ake's mental illness, and say he is dangerous to society. "That should said defendants

Glen Burton AKE, a/k/a Johnny - Vandeneaver, Appellant,
v.
The STATE of Oklahoma, Appellee.

No. F-80-522.

Court of Criminal Appeals of Oklahoma.

April 12, 1983.

Defendant was convicted before the District Court, Canadian County, James D. Bednar, J., of two counts of murder in the first degree and two counts of shooting with intent to kill, and he appealed. The Court of Criminal Appeals, Bussey, P.J., held that: (1) defendant was not prejudiced by trial court's failure to grant a second preliminary hearing; (2) trial court did not err in dismissing prospective juror who stated that she could not impose the death penalty on anyone; (3) evidence sustained finding that defendant's confession was knowingly and voluntarily given; (4) trial court did not err in admitting photograph which demonstrated how defendant rendered his victim helpless before murdering him; (5) prosecutor who stated in closing argument that there was "no doubt" that defendant was guilty was permissibly arguing State's conclusions based upon the evidence in the case; (6) trial court did not abuse its discretion in refusing jury's request that testimony of defense witness be repeated, since there was no reason to believe that jury did not hear and understand that witness' testimony as it was given in court; (7) defendant failed to establish any reasonable doubt as to his sanity at the time the crimes were committed; and (8) evidence sustained jury's finding of aggravated circumstances.

Affirmed.

1. Criminal Law ⇐134(2), 1044.2(1)

Defendant's change of venue motion which was not verified by affidavit or supported by affidavit of at least three credible persons residing within the county failed to comply with applicable statutory procedure and was therefore not properly before trial court, and likewise it was not properly before Court of Criminal Appeals. 22 O.S. 1981, § 561.

2. Jury ⇐103(1)

It is not necessary that juror be completely ignorant of facts and circumstances surrounding the case; it is sufficient if juror can disregard his or her own opinion in rendering verdict based on the evidence presented.

3. Criminal Law ⇐1035(5)

Defendant who waived his last two peremptory challenges could not complain of juror bias on appeal.

4. Criminal Law ⇐1044(3)

Defendant who failed to preserve in motion for new trial his contention that trial court erred by not granting a second preliminary hearing thereby waived any error that occurred.

5. Criminal Law ⇐237

Trial court did not abuse its discretion in failing to grant defendant a second preliminary hearing to determine defendant's ability to assist his attorneys, since defendant announced ready at preliminary hearing, no attempt was made to raise the issue of his ability to assist counsel, defendant profited from the preliminary hearing, and there was no showing of prejudice arising out of failure to grant second preliminary hearing.

6. Jury ⇐108

Trial court did not err in dismissing prospective juror who stated that she could not impose the death penalty on anyone.

7. Criminal Law ⇐1035(5), 1044(6)

Any error arising out of trial court's dismissal of prospective juror who stated that she could not impose the death penalty on anyone was waived as the result of defendant's failure to object when juror was excused or to preserve the error in new trial motion.

8. Costs ⇐302.3, 302.4

State does not have the responsibility of providing court-appointed psychiatrist and court-appointed investigator to indigents charged with capital crimes.

9. Criminal Law ⇐1044(6)

Defendant who failed to preserve in new trial motion his contention that trial court erred in failing to provide services of court-appointed psychiatrist thereby waived the matter.

10. Criminal Law ⇐536(1)

Fact that defendant was sustained on medication throughout his trial did not deprive defendant of his statutory and constitutional rights to be present at trial, since the medication was administered pursuant to orders of doctors who treated defendant at state hospital and who informed trial court that defendant was competent to stand trial, and could assist his attorney, provided he continued to take prescribed medication.

11. Criminal Law ⇐625

Trial court was not under a duty to raise, sua sponte, the issue of defendant's present sanity as the result of fact that defendant was sustained on medication throughout his trial, since defendant's medication was prescribed by doctors who treated defendant at state hospital and who informed trial court that defendant was competent to stand trial provided he continued taking the prescribed medication, and trial court was not bound to deduce from defendant's demeanor that a hearing was necessary.

12. Criminal Law ⇐531(3)

Evidence at suppression hearing sustained finding that defendant's confession was knowingly and voluntarily given.

13. Criminal Law ⇐1044(4)

Defendant who failed to preserve in motion for new trial his contention that confession, in its deleted form, was prejudicial, thereby failed to properly preserve the issue for appeal.

14. Criminal Law ⇐1169.12

Defendant was not prejudiced by the admission of confession which contained blank spaces and blank pages as the result of trial court's deletion of references to other crimes.

15. Criminal Law ⇐438(5)

In prosecution for murder, trial court did not err in admitting photograph which demonstrated how defendant rendered his victim helpless before murdering him, since the photograph was not gruesome and did not unfairly prejudice defendant.

16. Criminal Law ⇐886(1)

It is incumbent upon defense attorney to raise an objection to introduction of evidence of other crimes, lest the error be waived.

17. Criminal Law ⇐1169.11, 1173.2(9)

In prosecution for murder and shooting with intent to kill, admission of testimony concerning defendant's attempt to rape one of the victims and trial court's failure to give a limiting instruction was harmless, since evidence presented against defendant was overwhelming and jury would have rendered the same verdict and imposed the same sentence had the evidence not been presented or had the instruction been given.

18. Criminal Law ⇐720(7)

Prosecutor who stated in closing argument that there was "no doubt" that defendant was guilty was permissibly arguing State's conclusions based upon the evidence in the case.

19. Criminal Law ⇐1171.1(6)

Prosecutor's statement in closing argument to the effect that if the criminal charges had not been pending, defendant would have gone out on the street a free man, which statement was made in response to defendant's argument that, if found to be insane, he would not be "turned loose," did not require modification or reversal of conviction, since jury was properly instructed concerning consequences of an innocent by reason of insanity verdict, and evidence against defendant was so overwhelming that it was inconceivable that verdict was based solely on the remarks.

20. Criminal Law ⇐1042

Remarks made by prosecutor during sentencing stage of trial did not rise to the level of fundamental error so as to require reversal in absence of objections at trial.

21. Criminal Law ⇐1174(3)

Failure to return jury to courtroom for consideration of jury's note requesting that testimony of a defense witness be repeated was harmless, since trial court replied to jury's request in writing and counsel for both sides were given opportunity to object to both form and substance of the note. 22 O.S. 1981, § 894.

22. Criminal Law ⇐859

Trial court did not abuse its discretion in refusing jury's request that testimony of defense witness be repeated, since there was no reason to believe that jury did not hear and understand that witness' testimony as it was given in court.

23. Criminal Law ⇐1119(1)

On appeal from conviction of murder and shooting with intent to kill, record failed to support defendant's contention that lack of air conditioning in courthouse in which trial and jury deliberations were conducted forced the jury to return guilty verdict without proper deliberation.

24. Criminal Law ⇐311, 570(2)

In every case there is an initial presumption of sanity, and that presumption remains until defendant raises, by sufficient evidence, a reasonable doubt as to his sanity at the time of the crime; if the issue is so raised, burden of proving defendant's sanity beyond a reasonable doubt falls upon state.

25. Homicide ⇐227

In prosecution for murder and shooting with intent to kill, defendant failed to establish any reasonable doubt as to his sanity at the time the crimes were committed.

26. Criminal Law ⇐1064(1)

Defendant's allegation that the felony-murder doctrine was unconstitutional was not properly before Court of Criminal Appeals, since it was not preserved in the motion for new trial.

27. Criminal Law ⇐1206(1)

Statute holding defendant in a capital case to proof of mitigating circumstances in sentencing stage of bifurcated trial was not contrary to the due process principle that state must carry the burden of proving defendant's guilt beyond a reasonable doubt. 21 O.S. 1981, § 701.11.

28. Criminal Law ⇐1200(7)
Homicide ⇐354

Evidence in prosecution for murder in the first degree and shooting with intent to kill sustained finding that murder was especially heinous, atrocious or cruel, that the murders were committed to avoid or prevent a lawful arrest or prosecution, and that a probability existed that defendant would commit criminal acts of violence that would constitute a continuing threat to society, and because the death sentences for those murder charges were not imposed under the influence of passion, prejudice or any other arbitrary factor and because the death sentences were not excessive or disproportionate to those imposed in other cases, imposition of the sentences of death would be affirmed.

An appeal from the District Court of Canadian County; James D. Bednar, Judge.

Glen Burton Ake, a/k/a Johnny Vandenover, appellant, was convicted of two counts of Murder in the First Degree and two counts of Shooting with Intent to Kill in the District Court of Canadian County, Oklahoma, Case Nos. CRF-79-302, CRF-79-303, CRF-79-304, CRF-79-305. He was sentenced to death for each murder count and to 500 years' imprisonment for each shooting with intent to kill count, and appeals. AFFIRMED.

Richard D. Strubhar, Reta M. Strubhar, Yukon, for appellant.

Jan Eric Cartwright, Atty. Gen., Chief, Appellate Crim. Div., Oklahoma City, for appellee.

OPINION

BUSSEY, Presiding Judge:

The appellant, Glen Burton Ake, also known as Johnny Vandenover, was convicted by a jury in Canadian County, Oklahoma, of two counts of Murder in the First Degree and two counts of Shooting with Intent to Kill. He was sentenced to death for each of the murder charges, and sentenced to a five-hundred year prison term for each of the shooting with intent to kill counts. He has perfected a timely appeal to this Court.

On the evening of October 15, 1979, in search of a suitable house to burgle, the appellant and his accomplice, Steven Keith Hatch, a/k/a Steve Lisenbee, drove their borrowed car to the rural home of Reverend and Mrs. Richard Douglass. The appellant gained entrance into the Douglass' home under the pretense that he was lost and needed help finding his way. After an initial conversation with sixteen-year-old Brooks Douglass in the entrance way of the Douglass' home, the appellant returned to his car, supposedly to get a telephone number. The appellant thereupon re-entered the house and produced a firearm. He was joined shortly afterwards by his accomplice, who also was armed.

The appellant and his accomplice ransacked the Douglass' home as they held the family at gunpoint. They bound and gagged Reverend Douglass, Mrs. Douglass and Brooks Douglass, and forced them to lie in the living room floor.

The two men then took turns attempting to rape twelve-year-old Leslie Douglass in a nearby bedroom. Having failed in their attempts, they bound and gagged Leslie, and forced her to lie in the living room floor with the other members of her family.

Throughout the episode, the appellant and his accomplice repeatedly threatened to kill all the members of the Douglass family, and covered their heads with articles of clothing as they lay helpless on the floor.

The appellant instructed his accomplice to go outside, turn the car around, and "listen for the sound." The accomplice left the house as he was told. The appellant then shot Reverend Douglass and Leslie each twice with a .357 magnum pistol, Mrs. Douglass once, and Brooks once; and fled.

Mrs. Douglass died almost immediately as a result of the gunshot wound. Reverend Douglass' death was caused by a combination of the gunshots he received, and strangulation from the manner in which he was bound. Leslie and Brooks managed to untie themselves and drive to the nearby home of a doctor.

The appellant and his accomplice were apprehended in Colorado following a month-long crime spree which took them through Arkansas, Louisiana, Texas, and much of the Western half of the United States.

Subsequent to their extradition to Oklahoma, Leslie Douglass identified the appellant in a lineup. The appellant confessed to the shootings.

The error first alleged by the appellant is that the trial court wrongfully refused to grant a change of venue. He argues the pre-trial publicity concerning the crime and events occurring subsequent thereto, including the fact that the appellant's accomplice had earlier been found guilty of the crimes at issue and sentenced to death, was of such an extent as to bias the community against him, thereby denying him the benefit of an impartial jury.

[1-3] The appellant failed to comply with the statutory procedure for change of venue mandated by 22 O.S.1981, § 561. The motion was not verified by affidavit, nor was it supported by the affidavits of at least three credible persons residing within the county. Thus, the motion not having been properly before the trial court, is likewise not properly before this Court. *See, Irvin v. State*, 617 P.2d 588 (Okl.Cr.1980); *Bruton v. State*, 521 P.2d 1382 (Okl.Cr. 1974); *Adams v. State*, 25 Okl.Cr. 298, 220 P. 59 (1923). The motion was properly overruled.[1]

1. The murder/shootings of the Douglass family attracted a significant amount of media at-

The appellant next alleges that the trial court erred by not granting a second preliminary hearing in this case. The appellant's preliminary hearing was held conjointly with his accomplice on January 21, 1980. He was ejected from his February 14, 1980, arraignment for disruptive behavior. One week later, the judge who presided at the arraignment, on his own motion, ordered the appellant to undergo psychiatric evaluation. On April 10, 1980, a special sanity hearing was held at which the appellant was found to be mentally ill and ordered committed to Eastern State Mental Hospital for observation and treatment. He was subsequently adjudged competent to stand trial, and the proceedings against him reinstated on May 27, 1980.

The appellant filed a motion requesting a second preliminary hearing. He argued that he was unable to assist his attorneys at the January 21, 1980, preliminary hearing because of his lack of competency. The motion was overruled.

The appellant announced ready at the preliminary hearing. No attempt was made to raise the issue of his ability to assist counsel. We cannot presume, absent any supporting evidence, that the appellant was incompetent at that time. A review of the transcript of the preliminary hearing reveals that the appellant did indeed profit from the preliminary hearing. Counsel for the appellant thoroughly and adequately cross-examined witnesses offered by the State. He raised the issue through cross-examination of the appellant's state of mind during the criminal episode, and challenged one of the surviving victims' identification of the appellant as the man who shot him. The appellant also put on witnesses and obtained copies of police and medical reports.[2]

[4] The appellant failed to preserve the issue in the motion for a new trial. Had any error occurred, it was thereby waived. *Stevenson v. State*, 637 P.2d 878 (Okl.Cr. 1981).

[5] In addition, the appellant has not shown he was prejudiced at trial by the failure to grant the second preliminary hearing. There was no fundamental error. We conclude that the judge did not abuse his discretion.

tion in Oklahoma. Most, if not all, of the jurors in this case had been exposed to various forms of media accounts of the crimes and the events subsequent thereto. The appellant attempts to bolster his contention with the results of a poll conducted on behalf of his accomplice and himself, which indicated that forty-four percent of those surveyed believed the appellant to be guilty prior to his trial. Additionally, the appellant has provided this Court with a copy of an advertisement used by the Sheriff of Canadian County in his bid for re-election, which depicts the handcuffed appellant being escorted by that sheriff. The caption of the picture was, "Quality law enforcement takes a tough, dedicated professional—let's keep Lynn Stedman Sheriff."

It is not necessary that a juror be completely ignorant of the facts and circumstances surrounding a case. It is sufficient if the juror can disregard his/her own opinion and render a verdict based on the evidence presented. *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *Russell v. State*, 528 P.2d 336 (Okl. Cr.1974). In this case, after extensive examination by counsel for both sides, each juror stated he/she could do so.

In addition, we note that the trial court did not rule on the motion to change venue until completion of the voir dire to determine the extent of the bias, if any, that existed in the minds of the veniremen. The appellant was afforded wide latitude in examination of the veniremen. This procedure afforded the appellant ample time to weed out unsatisfactory or biased jurors. Moreover, the appellant waived his last two peremptory challenges. Having done so, he cannot complain of juror bias on appeal. *Carpitcher v. State*, 586 P.2d 75 (Okl. Cr.1978).

2. In regard to this matter, we note that the appellant focuses his argument in this allegation of error upon a statement made by the judge while denying the motion. At one point, the judge stated, "It [the preliminary hearing] is not designed as a deposition-type hearing for the defendant to make a great deal of discovery." Although the language of *Beaird v. Ramey*, 456 P.2d 587 (Okl.Cr.1969), reveals the erroneous flavor of the judge's statement, we find it to be of little consequence. As demonstrated in the text, the preliminary hearing did in fact work as a discovery device for the appellant.

Additionally, we note that the judge did not base his ruling solely on this factor. Thus, the appellant's argument, while possessing some merit, gains him nothing.

[6] The appellant alleges in his next assignment of error that a prospective juror was dismissed in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).[3]

We find no error in this matter. The form and substance of the questions were very similar to those we approved in *Chaney v. State*, 612 P.2d 269 (Okl.Cr.1980); and the answers given by the juror indisputably satisfy the Witherspoon concerns. See, 88 S.Ct. at 1777 n. 21.

[7] In addition, the appellant did not examine the prospective juror, did not object when she was excused, and did not preserve the error in the motion for a new trial. Thus, had any error occurred, it was waived. *Hays v. State*, 617 P.2d 223 (Okl. Cr.1980).

[8] The appellant's ninth assignment of error is that he, as an indigent defendant, should have been provided the services of a court-appointed psychiatrist and a court-appointed investigator as incident to his constitutional rights to effective assistance of counsel and availability of compulsory process for obtaining witnesses.

We have held numerous times that, the unique nature of capital cases notwithstanding, the State does not have the responsibility of providing such services to indigents charged with capital crimes. *Irvin v. State*, 617 P.2d 588 (Okl.Cr.1980); and cases cited therein.

[9] In addition, the argument was not preserved in the motion for new trial. It was thereby waived. *Hawkins v. State*, 569 P.2d 490 (Okl.Cr.1977).

The appellant's next two allegations of error concern the fact that he was sustained on 600 milligrams of Thorazine per day throughout his trial. The medication was administered pursuant to the orders of the doctors who treated him at Eastern State Hospital at Vinita. Dr. R.B. Garcia informed Judge Martin (who was originally to preside over the case) by letter dated May 22, 1980, that the appellant was competent to stand trial, and could assist his attorney, provided he continue taking the prescribed medication.

The appellant remained mute throughout the trial. He refused to converse with his attorneys, and stared straight ahead during both stages of the proceedings. He argues that, because of the effect of the Thorazine, he was not actually present at his trial; and thereby denied his statutory and constitutional rights. Secondly, he argues that, due to his conduct at trial, the trial court should have halted the proceedings and impaneled a jury to evaluate his present sanity.

[10] Both of these issues boil down to the question of whether the Thorazine medication rendered him unable to understand the proceedings against him and affected his ability to assist counsel. *Beck v. State*, 626 P.2d 327 (Okl.Cr.1981).

Dr. Garcia testified that he had diagnosed the appellant's condition as schizophrenia of

3. The appellant's argument revolves around the following dialogue excerpted from the record:

THE COURT: This is a case in which the State of Oklahoma is seeking the death penalty, and I will ask you this question. In a case where the law and the evidence warrant, in a proper case, could you without doing violence to your conscience agree to a verdict imposing the death penalty?
MRS. WOLFE: No, sir, I could not.
THE COURT: All right. Let me ask you this. Knowing that the law provides for the death penalty in certain proper cases, and knowing that the State will ask you to bring back a verdict of death in this case, and considering your reservations about the death penalty, do you have such conscientious opinions as would prevent you from making an impartial decision as to whether the defendant is guilty or not guilty?
MRS. WOLFE: Sir, I could not impose the death penalty on anyone.
THE COURT: All right. I need to ask you one other question. If you found beyond a reasonable doubt that the defendant was guilty of Murder in the First Degree, and if under the evidence, facts, and circumstances of the case, the law would permit you to consider a sentence of death, are your reservations about the death penalty such that regardless of the law, the facts, and circumstances of the case, you still would not consider fairly the imposition of the death penalty?
MRS. WOLFE: No, Sir.

the paranoid type, which necessitated maintenance on the Thorazine to stabilize his personality. Dr. Garcia further testified that, although the dosage of Thorazine which the appellant was taking would sedate a normal individual, it had a therapeutic effect of eliminating the symptoms of the appellant's condition. Without the benefit of the medication, the appellant could revert to a violent and dangerous state.

In the letter to Judge Martin, referred to above, Dr. Garcia stated the appellant, with the benefit of medication, was competent to stand trial and assist his attorneys in his defense. The appellant remained on his prescribed medication, and there is no evidence that any change in his competency occurred in the month between his release from Vinita and his trial. Thus, we have no reason to believe the appellant's behavior was caused by any factor other than his own volition.[4]

The appellant additionally asserts that, according to *Peters v. State*, 516 P.2d 1372 (Okl.Cr.1973), the trial court was under a duty to first cite the appellant for contempt of court, and, secondly to bind and gag him before allowing the use of drugs to sedate him through his trial. This argument misconstrues the purpose behind the medication given the appellant. The appellant's disruptive behavior at his preliminary hearing gave rise to the proceedings which eventually led to his commitment at Vinita and ensuing treatment with Thorazine. However, even though the treatment indirectly resulted from the appellant's misbehavior, the Thorazine was not administered to him for the sole purpose of rendering him sufficiently tranquil to facilitate progress of the criminal proceedings instituted against him. Thus, the appellant's reliance on *Peters* is misplaced.

Likewise, we disagree with the contention that the appellant should have been treated as an insane person, incapable of standing trial, because of the necessity of Thorazine treatment to "normalize" him. Psychopharmaceutical restoration of persons to a state of normality is not an uncommon practice in modern society. If a defendant may be rendered competent to assist in his defense through the use of medication, it is in the best interests of justice to afford him a speedy trial. See, *State v. Stacy*, 556 S.W.2d 552 (Tenn.Cr. 1977); and cases cited therein. See also, *State v. Jojola*, 89 N.M. 489, 553 P.2d 1296 (1976).[5]

[11] Concerning the trial court's failure to impanel a jury to determine the present sanity of the appellant, we note initially that the appellant's attorneys voluntarily withdrew the motion for trial on present sanity because the appellant had just been returned from Vinita, certified as competent to stand trial. Since the motion was withdrawn, the court obviously had no occasion to rule on it. We cannot say that the court was under a duty to raise the issue *sua sponte*. In light of the facts that the appellant had been released from Vinita one month before, certified as competent to stand trial, and that he was maintaining his medication; the trial court had no good reason to order a trial on the appellant's present sanity. Although the appellant's refusal to communicate with his attorneys was brought to the attention of the trial judge, and although the appellant's demeanor was observable, it does not necessarily follow that the trial court was bound to deduce from such behavior that another hearing was needed.

4. It is quite possible that the defense of insanity interposed by the appellant fostered such behavior on his part. Nonetheless, the jury was well aware of the fact that the appellant was being maintained on the Thorazine. The appellant was present throughout the trial, and his demeanor was readily discernable by the jurors. Notwithstanding the appellant's "abnormal" behavior at trial, the jury determined that he was sane.

5. One notable case contra to our holding is *State v. Maryott*, 6 Wash.App. 96, 492 P.2d 239 (1971), wherein it was held that a defendant was improperly tried while being maintained on medication. The defendant in that case stared vacantly ahead throughout the trial as did the appellant in this case. It must be noted, however, that the defendant in that case was taking a combination of several drugs, all of which were known to be strong depressants with notable side effects.

According to the statute authorizing trials on present sanity, a doubt must arise as to the defendant's sanity. 22 O.S.1981, § 1162. The doubt referred to in the statute has been interpreted to be doubt which must arise in the trial court's mind after an evaluation of the facts, information concerning the defendant's insanity and motive. *Beck v. State*, supra. *Reynolds v. State*, 575 P.2d 628 (Okl.Cr.1978); *Russell v. State*, supra. The existence of doubt of the defendant's sanity must arise from facts and circumstances of a substantial character. There must be reason to believe that the defendant's claim of insanity is genuine and not simulated to delay justice. *Bingham v. State*, 82 Okl.Cr. 5, 165 P.2d 646 (1946); *Laskovich v. State*, 377 P.2d 977 (Okl.Cr.1963). The appellant's demeanor was but one factor to consider in light of the facts and circumstances in this case. We cannot say the judge abused his discretion in failing to order a trial on present sanity. *Reynolds*, supra; *Beck*, supra.

The appellant's next two allegations of error concern the confession he gave to the police after his arrest. The confession was forty-four (44) typewritten pages in length. It contained detailed descriptions of the shootings of the Douglass family, as well as events which occurred before and after.

[12] Initially, the appellant argues he was insane when he made the confession, thus it was involuntary. However, the appellant failed to establish any doubt of his sanity at the time the crime was committed. The sheriff who took the confession testified the appellant understood his rights, and voluntarily waived them. The confession was lucid and detailed. The appellant read the lengthy typewritten copy of the confession, corrected spelling errors and filled in missing details. Lastly, although the appellant was adjudged incompetent to stand trial approximately five months after the crime was committed, none of the psychologists who examined him could offer an opinion of the state of the appellant's mental condition prior to the time they observed him.

We are of the opinion the confession was knowingly and voluntarily given. See, *Watkins v. State*, 572 P.2d 998 (Okl.Cr. 1977).

The appellant's second allegation concerning the confession stems from the fact that the trial court deleted parts of the confession, because it contained information of other crimes committed by the appellant and his accomplice subsequent to the Douglass shootings. The deleted confession contained blank spaces and blank pages. The appellant maintains that the confession, in its deleted form, was prejudicial.

[13, 14] This allegation of error was not preserved in the motion for new trial. It has thus not been properly preserved for appeal. *Turman v. State*, 522 P.2d 247 (Okl.Cr.1974). In addition, we do not agree that the appellant was prejudiced by the form of the confession.

[15] In the appellant's fifth assignment of error, he argues that numerous photographs were unduly prejudicial and should not have been admitted into evidence. A review of both the trial transcript and the exhibits before us in the record reveals that all but one of the photographs complained of were indeed excluded by the trial court pursuant to the appellant's objection. The photograph which was admitted over the appellant's objections portrayed the nature in which one of the victim's feet were bound. The photograph served to demonstrate how the appellant in this case rendered his victim helpless before he brutally murdered him. The photograph was not gruesome, and did not unfairly prejudice the appellant. The trial court did not abuse its discretion in admitting the picture. *Holloway v. State*, 602 P.2d 218 (Okl.Cr.1979).

Next, the appellant alleges the trial court erred by allowing Brooks and Leslie Douglass, the two surviving victims, to testify concerning the appellant and his cohort's attempt to rape Leslie. He additionally argues that the trial court erroneously failed to instruct the jury concerning the alleged other crimes.

[16] The appellant failed to object to the testimony of which he now complains. Additionally, he failed to include it in the motion for new trial. The appellant has completely failed to bring the error, if any, to the attention of the trial court. As we stated in *Burks v. State*, 594 P.2d 771 (Okl.Cr.1979), it is incumbent upon the defense attorney to raise an objection to the introduction of evidence of other crimes, lest the error be waived.

[17] In addition, we hold that the admission of the testimony and the trial court's failure to give a limiting instruction was harmless. The evidence presented against the appellant in both stages of the trial was overwhelming. We are convinced that the jury would have rendered the same verdict and imposed the same sentences had the evidence not been presented, or had the instruction been given. *Burks* supra; *Luman v. State*, 626 P.2d 869 (Okl.Cr.1981).

The appellant's twelfth and thirteenth allegations are that the prosecutor impassioned the jury with improper arguments in both stages of the trial.

[18] The prosecutor stated numerous times in the closing argument of the first stage that there was "no doubt" the appellant was guilty. The prosecutor was permissibly arguing the State's conclusions based upon the evidence in the case. *Williams v. State*, 557 P.2d 920 (Okl.Cr.1976). In addition, the authority cited by the appellant in support of his argument are clearly inapplicable. See, *Evans v. State*, 546 P.2d 284 (Okl.Cr.1976) (wherein the prosecutor stated, "And I think you'll return a verdict of guilty because that's what I think he is.").

[19] The prosecutor in this case also stated that, "If we hadn't had these charges pending, he [the appellant] would have gone out on the street a free man." The statement was made in response to the appellant's argument that, if found to be insane, he would not be "turned loose." The prosecutor argued that the appellant had been sent to a mental hospital, treated and released. Thus, the gist of the prosecutor's argument was that the appellant would be, in effect, set free if found to be insane.

Although the prosecutor would have been better advised not to make such an argument, we do not find it of such magnitude to mandate modification or reversal. *Chaney v. State*, 612 P.2d 269 (Okl.Cr.1980). The jury was properly instructed concerning the consequences of an innocent by reason of insanity verdict. In addition, the evidence against the appellant was so overwhelming that it is inconceivable the verdict was based solely on such a remark. *Chaney*, supra.

[20] The appellant additionally complains of remarks made by the prosecutor during the second stage of the trial. The appellant admits in his brief that no objections were made. After careful examination of the record, we can find no error which rises to the level of fundamental error.

The appellant's tenth assignment of error concerns a note from the jury in which it was requested that the testimony of Dr. R.D. Garcia, a psychologist who testified for the defense, be repeated. The trial court declined to have a transcript of the testimony sent to the jury. The appellant alleges error on two grounds; first, that the jurors were not brought into open court for consideration of the note, pursuant to 22 O.S. 1981, § 894, and secondly that Dr. Garcia's testimony was not read to the jury.

[21] The appellant failed to object to the jury's absence during the court's discussion of the note. In addition, he failed to properly preserve the arguments for appeal in the motion for new trial. Nonetheless, we note that the trial court replied to the jury's request in writing, and that counsel for both sides were given opportunity to object to both the form and substance of the note. As we stated in *Boyd v. State*, 572 P.2d 276 (Okl.Cr.1977), the purpose of 22 O.S.1981, § 894, is to prevent certain communications from being made outside of open court which might influence the jury when both parties have not at least had a chance to be present to protect their interests. Thus, although the jury should have been returned to the courtroom pursuant to § 894, failure to do so here was harmless. *Boyd*, supra; see also, *Starr v. State*, 602 P.2d 1046 (Okl.Cr.1979).

[22] In response to the appellant's second argument that the jury should have been allowed to rehear Dr. Garcia's testimony, we note that the decision to allow or disallow the jury's request lies within the discretion of the trial court. *Jones v. State*, 456 P.2d 610 (Okl.Cr.1969). The appellant contends that, as evidenced by the "choppy record," it was difficult for the jury to understand Dr. Garcia's testimony. We cannot agree with the appellant's assessment of the nature of Dr. Garcia's transcribed testimony. From the record before us, we have no reason to believe that the jury did not hear and understand Dr. Garcia's testimony as it was given in court. Accordingly, we decline to hold that the trial court abused its discretion. *Jones*, supra.

[23] The appellant next alleges that the lack of air conditioning in the courthouse in which the trial and jury deliberations were conducted forced the jury to return the verdict without proper deliberation. The appellant has failed to cite, nor can we find, any evidence in the record to support such a contention. Although the courtroom may have been somewhat uncomfortable, there is no evidence that the jury failed to exercise utmost diligence in reaching its verdict. Indeed, upon having been given the opportunity to recess for the night, and wait until the following morning to begin deliberations in the second stage, the jury elected to remain and deliberate. The contention is clearly without merit.

In his fifteenth allegation of error, the appellant maintains that the verdict was against the clear weight of the evidence. He argues the jury should have returned a verdict of not guilty by reason of insanity.

[24] In every case there is an initial presumption of sanity. This presumption remains until the defendant raises, by sufficient evidence, a reasonable doubt as to his sanity at the time of the crime. If the issue is so raised, the burden of proving the defendant's sanity beyond a reasonable doubt falls upon the State. *Rogers v. State*, 634 P.2d 743 (Okl.Cr.1981); *Richardson v. State*, 569 P.2d 1013 (Okl.Cr.1977).

[25] The appellant had no history of mental illness. When each of the three doctors who testified on behalf of the appellant was asked whether he had an opinion as to the appellant's ability to distinguish between right and wrong at the time of the shootings, each answered in the negative. They could only testify as to their opinions that the appellant was "mentally ill" several months after the crimes had occurred.

The appellant clearly failed to establish any reasonable doubt as to his sanity at the time the crimes were committed. The jury was properly instructed concerning the standard of sanity and the burden of proof. We cannot agree that the jury's verdict was against the weight of the evidence. *Rogers*, supra.

The appellant's eighteenth assignment of error is that the accumulation of errors alleged in the foregoing assignments of error mandates reversal in this case. We have held in the past that if a defendant's previous assignments of error are found to be without merit, the argument which asks that those previous allegations be considered collectively is likewise without merit. *Brinlee v. State*, 543 P.2d 744 (Okl.Cr. 1975); *Haney v. State*, 503 P.2d 909 (Okl.Cr. 1972). Since we have found all of the appellant's allegations of error to be without merit, we find this argument meritless also.

[26] The appellant's seventeenth allegation of error is that the felony-murder doctrine is unconstitutional. This allegation is not properly before this Court, as it was not preserved in the motion for new trial. *Turman v. State*, supra.

[27] The appellant argues in his nineteenth assignment of error that the statutory scheme of 21 O.S.1981, § 701.11 unconstitutionally shifts the burden of proving mitigating circumstances onto defendants in

capital cases after aggravating circumstances are proven by the State.

We note initially that the issue is not properly before this Court, because it was not preserved in the motion for new trial. *Farman v. State*, supra. Nonetheless, due to the nature of the contention, we shall consider it.

In support of his contention, the appellant cites *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Bauer v. State*, 8 Okl.Cr. 529, 107 P. 525 (1910); *Meadows v. State*, 487 P.2d 369 (Okl.Cr.1971); and *Pettigrew v. State*, 564 P.2d 1186 (Okl.Cr.1976). None of the authority cited supports the appellant's contention. These cases stand for the rule that a defendant in a criminal case cannot be constitutionally required to produce evidence to negate or mitigate the degree of a criminal charge against him. *Mullaney v. Wilbur*, supra.

In the present case, the statute in question addresses the nature of the punishment to be imposed after the determination of guilt has been made. Thus, the considerations relevant to the guilt determination espoused in the cases cited by the appellant are inapplicable. The appellant was not *required* to produce any evidence in support of mitigation at all. However, since he chose to have the jury consider factors which he hoped to justify his appeal for leniency, it was incumbent upon him to prove their existence. The defendant is in the best position to know of and present evidence in mitigation. See, *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (Ariz.Sup. 1978). To hold a defendant in a capital case to proof of mitigating circumstances in the sentencing stage of a bifurcated trial, should he so chose to raise them, is not contrary to the Due Process principle that the State must carry the burden of proving a defendant's guilt beyond a reasonable doubt. *Winship*, supra; *Mullaney*, supra; *Watson*, supra.

[22] Lastly, we review the sentences imposed upon the appellant as mandated by 21 O.S.1981, § 701.13.

We are of the opinion that the sentences were not imposed under the influence of passion, prejudice or any other arbitrary factor. Our discussion of the appellant's various allegations concerning this issue in the text of this opinion reveal that the appellant's sentences were imposed in accordance with the evidence presented, free from the taint of passion and prejudice. In addition, as previously discussed, the evidence against the appellant was overwhelming in both stages, and provide ample justification for the penalty imposed.

Likewise, we are of the opinion the evidence supports the finding of the aggravating circumstances. The jury found the aggravating circumstances justifying the imposition of the death penalty to be: 1) that the murder was especially heinous, atrocious or cruel; 2) that the murders were committed to avoid or prevent a lawful arrest or prosecution; and 3) that a probability existed that the appellant would commit criminal acts of violence that would constitute a continuing threat to society.

The appellant in this case invaded the sanctity of his victims' home, bound each one and forced them to lie in the floor. The appellant and his accomplice discussed killing the family, and made them promise not to call the police if allowed to live. Unheeded by Mrs. Douglass' plea for their lives, the appellant ruthlessly emptied a .357 magnum pistol into the bodies of the helpless victims before he fled their home. We believe the facts adequately support each of the three aggravating circumstances found by the jury.

Lastly, we find that the sentences of death are not excessive or disporportionate to those imposed in other cases.[6]

6. *Smith v. State*, 659 P.2d 330, 54 OBAJ 452 (Okl.Cr.1983); *Parks v. State*, 651 P.2d 686 (Okl.Cr.1982); *Jones v. State*, 648 P.2d 1251 (Okl.Cr.1982); *Hays v. State*, 617 P.2d 223 (Okl.Cr.1980); *Eddings v. State*, 616 P.2d 1159 (Okl.Cr.1980) (remanded for resentencing, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1); *Chaney v. State*, 612 P.2d 269 (Okl.Cr.1980).

We have also compared this case to other capital cases which have been modified to life or reversed for other reasons.[7]

Having fully reviewed the record and arguments presented on appeal, we find no reason to interfere with the jury's decision. The judgments and sentences are AFFIRMED.

CORNISH and BRETT, JJ., concur.

David Michael BLACKWELL, Appellant,

v.

The STATE of Oklahoma, Appellee.

No. F-80-688.

Court of Criminal Appeals of Oklahoma.

April 20, 1983.

Defendant was convicted in the District Court, Cleveland County, Alan J. Couch, J., of first-degree murder, and he appealed. The Court of Criminal Appeals, Brett, J., held that: (1) confessions given by defendant after he had been informed of his rights and was told that only district attorney was empowered to offer immunity were admissible as confessions voluntarily made to police officers, despite defendant's claimed expectation that his actions would lead to negotiation of plea bargain; (2) evidence of crime of arson was admissible at murder trial, since burning of car was part of entire transaction surrounding events leading up to victim's death and immediately thereafter; (3) evidence was sufficient to sustain conviction; (4) verdict form giving no indication which offense jury agreed upon as underlying felony to felony-murder provided constitutionally guaranteed unanimous verdict; (5) evidence was sufficient to support finding that defendant committed rape, even though his involvement may have been limited to overcoming resistance of victim by brandishing knife; (6) defendant was not deprived of substantial right by trial court's failure to admonish jury that no evidentiary weight could be placed on defendant's failure to testify; and (7) defendant was not denied right to public trial, under circumstances, by fact that law center, where defendant's trial was held, was locked during time jury was deliberating during punishment phase of trial.

Affirmed.

1. Criminal Law ⇐488

Statements, admissions, and confessions, given by defendant after he was informed of his rights several times and was told that only district attorney was empowered to offer immunity, were admissible as admissions or confessions voluntarily made to police officers and were not excludable as having been part of plea negotiations; defendant's expectation that his actions would lead to negotiation of plea bargain was not reasonable under circumstances surrounding giving of statements. U.S. C.A. Const.Amend. 5; 12 O.S.1981, § 2410.

2. Criminal Law ⇐781(1)

Under circumstances, defendant was not entitled to jury instruction that defendant's statements made in conjunction with plea negotiations were inadmissible. U.S. C.A. Const.Amend. 5; 12 O.S.1981, § 2410.

3. Criminal Law ⇐369.1

As general rule, evidence of other crimes is inadmissible; accused put on trial

7. *Jones v. State*, 660 P.2d 634, 54 OBAJ 661 (Okl.Cr.1983); *Driskell v. State*, 659 P.2d 343, 54 OBAJ 460 (Okl.Cr.1983); *Boutwell v. State*, 659 P.2d 322, 54 OBAJ 402 (Okl.Cr.1983); *Munn v. State*, 658 P.2d 482, 54 OBAJ 402 (Okl.Cr.1983); *Odum v. State*, 651 P.2d 703 (Okl.Cr.1982); *Hall v. State*, 650 P.2d 893 (Okl.Cr.1982); *Brewer v. State*, 650 P.2d 54 (Okl.Cr.1982); *Burrows v. State*, 640 P.2d 533 (Okl.Cr.1982); *Franks v. State*, 636 P.2d 381 (Okl.Cr.1981); *Irvin v. State*, 617 P.2d 588 (Okl.Cr.1980); *Hager v. State*, 612 P.2d 1389 (Okl.Cr.1980).

1. O.S. 21 §701.7 Murder in the first degree.

A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson.

2. O.S. 21 §701.9 Punishment for murder.

A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

3. O.S. 21 §701.10 Sentencing proceeding--Murder in the first degree

Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravatiion as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

4. O.S. 21 §701.11 Instructions - Jury findings of aggravating circumstance.

In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

5. 21 O.S. §701.12 Aggravating circumstances

Aggravating circumstances shall be:
1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;
2. The defendant knowingly created a great risk of death to more than one person;
3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
4. The murder was especially heinous, atrocious, or cruel;
5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;
6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;
7. The existence of a probability that the defendant would commit criminal acts of violence that would constitutew a continuing threat to society; or
8. The victim of the murder was a peace officer as defined by Section 99 of Title 21 of the Oklahoma Statutes, or guard of an institution under the control of the Department of Corrections, and such person was killed while in performance of official duty. Laws 1976, 1st Ex.Sess., c.1, §6, eff. July 24, 1976. Laws 1981, c. 147 §1, eff. May 8, 1981.

6. O.S. 21 §701.13 Death Penalty - Review of sentence

A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket numer of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:
1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and
3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1. Affirm the sentence of death; or
2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

7. 22 O.S. (1971) §1171 Doubt as to present sanity prior to calling of indictment or information for trial or preliminary hearing.

If any person is held in confinement because of criminal charges, or if he has criminal charges pending or likely to be filed against him, or if he has been taken into custody because of a criminal act or acts, and prior to the calling of an indictment or information for trial or preliminary hearing, a doubt arises as to his present sanity, either such individual or the district attorney may make application to the District Court for an order committing such individual to a state hospital within the Department of Mental Health for observation and examination for a period not to exceed sixty (60) days. Provided, however, where an adequate examination can be had in the county where the charge is

pending, such examination shall be held in such county. Provided, however, the court may extend the sixty-day period where a need for such extension is shown. Any criminal proceedings against such individual shall be suspended pending the hearing of the application by the District Court. laws 1963, c. 184, §1; Laws 1969, c. 288, §1. Emerg. eff. April 25, 1969.

8. 22 O.S. §1175.2 Application for determination of competency--Service--Notice--Suspension of criminal proceedings

A. No person shall be subject to any criminal procedures after he is determined to be incompetent except as provided in this act. The question of the incompetency of a person may be raised by the person, the defense attorney, or the district attorney, by an application for determination of competency. The application for determination of competency shall allege that the person is incompetent to undergo further proceedings, and shall state facts sufficient to raise a doubt as to the competency of the person. The court may, at any time, initiate a competency determination on its own motion, without an application, if the court has a doubt as to the competency of the person.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GLEN BURTON AKE, a/k/a JOHNNY VANDENOVER,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

No. F-80-523

ORDER DENYING PETITION FOR REHEARING AND DIRECTING ISSUANCE OF MANDATE

NOW on this 15th day of June, 1983, after having examined the petitioner's petition for rehearing in the above styled and numbered cause, and being fully advised in the premises, this Court finds that it should be, and the same hereby is DENIED. The Clerk of this Court is directed to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 15th day of June, 1983.

HEZ J. BUSSEY, PRESIDING JUDGE

TOM R. CORNISH, JUDGE

TOM BRETT, JUDGE

ATTEST:

Clerk

Supreme Court of the United States

No. A-104

GLEN BURTON AKE,

Petitioner,

v.

OKLAHOMA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner~~(s)~~,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 13, 1983

/s/ Byron R. White

Associate Justice of the Supreme Court of the United States

Dated this 12th day of August, 19 83

OFFICE OF THE SUPERINTENDENT

STATE OF OKLAHOMA
DEPARTMENT OF MENTAL HEALTH

EASTERN STATE HOSPITAL
VINITA, OKLAHOMA
74301

ADDRESS ALL COMMUNICATIONS CONCERNING PATIENTS TO THE SUPERINTENDENT, GIVING THEIR FULL NAME. FOR PROMPT REPLY PLEASE ENCLOSE SELF-ADDRESSED STAMPED ENVELOPE.

22 May '80

The Honorable Floyd L. Martin
Judge of the District Court
In and For Canadian County
ElReno, Oklahoma 73036

FILED
80 MAY 27 PM 2:09
CLYDE GENE MILLER
COURT CLERK

Dear Judge Martin:

Re: AKE, Glenn Burton #32391
Your Case No. PMH 80-8

The above-named was admitted to this hospital by your order for care and treatment on April 10, 1980. Criminal charges are pending against him.

As a result of a recent evaluation it is the opinion of our staff that Mr. Ake has improved to where he would be able to adequately consult with an attorney and he does have a rational as well as actual understanding of the proceedings pending against him. He is being maintained on the following medication: Thorazine 200 mgms. t.i.d. We would of course recommend that he continue this medication in order for his condition to remain stabilized.

We would further recommend that he be returned to the jurisdiction of your court and we would appreciate your removing him from this hospital at your earliest convenience.

Respectfully,

R. D. Garcia, M.D.
Chief Forensic Psychiatrist

RDG:ml

cc: District Attorney, Canadian County, ElReno, Oklahoma
County Sheriff, Canadian County, ElReno, Oklahoma

DX 2 mm 6-24-80

This hospital complies with the Civil Rights Act of 1964.